Statutory Reaction to Revenue Procedure 64-19

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STATUTORY REACTION TO REVENUE PROCEDURE 64-19

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INTRODUCTION

Many view the federal estate tax marital deduction[1] as the most significant deduction in federal estate tax law.[2] Since its enactment twenty years ago,[3] lawyers and laymen alike have contrived numerous approaches to achieve either a specified marital deduction or the maximum marital deduction.[4] Of the various techniques de-

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[1] The federal estate tax marital deduction allows the estate of the decedent—either husband or wife—a deduction of *up to* one-half of the decedent's adjusted gross estate for "the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." INT. REV. CODE of 1954, §§ 2056(a), (c)(1). The concept "adjusted gross estate" was created exclusively for use in computing the 50 percent ceiling of the marital deduction. S. REP. No. 1013, pt. 2, 80th Cong., 2d Sess. 18-19 (1948). Assuming no community property is involved, the decedent's adjusted gross estate is "computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions [expenses, indebtedness, taxes and losses] allowed by sections 2053 and 2054." INT. REV. CODE of 1954, § 2056(c)(2)(A). For examples of computations, see Treas. Reg. §§ 20.2056(c)-1(b), (c)-2(a)-(j) (1962).

[2] Fleming, *Five Years' Experience With the Marital Deduction,* 34 CHI. B. RECORD 247 (1953); Kohn, *The Marital Deduction: When and How to Use It,* 16 W. RES. L. REV. 237 (1965); Note, 43 N.C.L. REV. 459, 460 (1965). *See* 2 FED. EST. & GIFT TAX REP. ¶ 7155 for an illustrative chart of the savings that might be realized by utilizing the marital deduction. For a list of authorities where many aspects of the marital deduction are discussed, see J. TRACHTMAN, ESTATE PLANNING 15 n.6 (1965).

[3] Revenue Act of 1948, ch. 168, § 361, 62 Stat. 117, amending INT. REV. CODE of 1939, ch. 3, § 812, 53 Stat. 123 (now INT. REV. CODE of 1954, § 2056). *See generally* Casner, *Estate Planning Under the Revenue Act of 1948,* 62 HARV. L. REV. 413 (1949); McLucas, *Marital Deduction for Estate Taxes,* 86 TRUSTS & ESTATES 445 (1948); Surrey, *Federal Taxation of the Family—The Revenue Act of 1948,* 61 HARV. L. REV. 1097 (1948).

The provision for the federal estate tax marital deduction was enacted in 1948 with a view toward equalizing the estate tax benefits and burdens available to married residents of common law and community property states. *See,* J. FARR, AN ESTATE PLANNER'S HANDBOOK 274-76 (3d ed. 1966) [hereinafter cited as FARR]; C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES 368-70 (2d ed. 1962) [hereinafter cited as LOWNDES & KRAMER].

[4] *See* A.J. CASNER, ESTATE PLANNING 790-97 (3d ed. 1961), 638-49 (Supp. 1967) [hereinafter cited as CASNER]; FARR 289-303; R. WORMSER,

veloped—both formula and non-formula bequests and transfers in trust (hereinafter referred to as bequests)[5]—this article will deal with the pecuniary interest bequest in light of problems created by the promulgation of Revenue Procedure 64-19.[6] A brief presentation of the evolution of the pecuniary interest bequest[7]—the first formula bequest developed[8]—should provide the background necessary for a meaningful appreciation of Revenue Procedure 64-19.

Evolution of Pecuniary Interest Formula

Draftsmen realized early that to achieve the maximum marital deduction, the instrument should provide for a dollar amount, equal

THE PLANNING AND ADMINISTRATION OF ESTATES 15-24, 258-66 (2d ed. 1966).

[5] The controversy over the merits of non-formulae bequests vis-à-vis the merits of the formulae bequests remains a viable one. *See, e.g.*, J. TRACHTMAN, *supra* note 2, at 40-55; R. WORMSER, *supra* note 4, at 263-64; Cox, *Types of Marital Deduction Formula Clauses*, N.Y.U. 15TH INST. ON FED. TAX. 909, 915-26 (1957); Craven, *Marital Deduction Problems: Use of the Percentage Formula Clause*, N.Y.U. 19TH INST. ON FED. TAX. 613, 617-21 (1961); Durand, *Draftsmanship: Wills and Trusts*, 96 TRUSTS & ESTATES 871, 872-74 (1957); Sargent, *Drafting of Wills and Estate Planning*, 43 B.U.L. REV. 179 (1963); Trachman, *Marital Deduction—Use of Non-Formula Provisions*, N.Y.U. 19TH INST. ON FED. TAX. 631 (1961).

Of the various formulae bequests used by lawyers and accountants, many are complicated, and the comparative merits of each have been and are the subject of continuing debate. *See, e.g.*, R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS (1966); Casner, *Estate Planning—Marital Deduction Provisions of Trusts*, 64 HARV. L. REV. 582 (1951); Casner, *How to Use Fractional Share Marital Deduction Gifts*, 99 TRUSTS & ESTATES 190 (1960); Durbin, *Marital Deduction Formula Revisited: Numerator-Denominator Approach as Solution to Current Problems*, 102 TRUSTS & ESTATES 545 (1963); Edwards, *Marital Deduction Formulae—A Planner's Guide*, 1967 DUKE L.J. 254 [hereinafter cited as Edwards]; Fleming, *supra* note 2; Golden, *Rev. Proc. 64-19: Implications for Attorneys and Fiduciaries*, 103 TRUSTS & ESTATES 536 (1964); McGorry, *Pecuniary or Fractional Formula*, 98 TRUSTS & ESTATES 422 (1959); Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations*, 63 MICH. L. REV. 809 (1965) [hereinafter cited as Polasky].

[6] Rev. Proc. 64-19, 1964-1 CUM. BULL. 682.

[7] For discussions of the historical development of the pecuniary interest formulae, see generally Edwards 255-57; Gradwohl, *"Vesting" Under Marital Deduction, Revenue Procedure 64-19 and Handling Pre-October 1, 1964, Disposition*, 45 NEB. L. REV. 441, 441-44 (1966); Lloyd, *Revenue Procedure 64-19: Background of Drafting Problems*, 103 TRUSTS & ESTATES 898, 898-99 (1964) [hereinafter cited as Lloyd]. For a good example of a will using the pecuniary interest formula, see *Report of Subcommittee on Forms for Marital Deduction Planning*, 103 TRUSTS & ESTATES 961, 962-64 (1964).

[8] For examples of some earlier types of pecuniary interests formulae, see CASNER 793-94; Casner, *How To Use Fractional Share Marital Deduction Gifts*, 99 TRUSTS & ESTATES 190 & n.1 (1960).

to one-half of the decedent's adjusted gross estate, which amount will include the value of property qualifying for the marital deduction and passing to the surviving spouse both under and outside the instrument.[9] A provision was added which allowed the executor to satisfy the maximum marital deduction by distributions in kind as well as in cash.[10] Absent the allowance for in-kind distributions,[11] the estate would probably suffer not only expenses and frequently substantial losses accompanying the disposal of the assets to obtain the required amount of cash,[12] but also the income taxes that would result from dispositions of appreciated assets.[13] Furthermore, the

[9] See LOWNDES & KRAMER 370-71; Wright, *The Marital Deduction Since Revenue Procedure 64-19,* 106 TRUSTS & ESTATES 101 (1967); Treas. Reg. § 20.2056(c)-1 (b) (1962). This early phraseology of the pecuniary interest formula was occasioned partially by the Internal Revenue Service's description of the marital deduction as "an amount equal to" the value of property which ultimately passed to the surviving spouse. INT. REV. CODE of 1954, § 2056(a). *See* Lauritzen, *The Marital Deductions,* 103 TRUSTS & ESTATES 318 (1964); Waters, *Saving the Marital Deduction From the Rev. Proc. 64-19 Trap,* 19 J. AM. SOC'Y C.L.U. 359, 366 (1965).

[10] *See* FARR 294; Lloyd 898. For a discussion of some of the difficulties confronting an executor who is empowered to make distributions in kind, see Rodman, *Executor's Power to Allocate Property to Qualify for the Marital Deduction,* 94 TRUSTS & ESTATES 801 (1955). Nevertheless, the grant of this discretionary power was found to be highly desirable. One reason was the enhanced flexibility in estate planning. As a result of this latitude, the marital bequest could be funded with numerous combinations of real and personal property and cash. *See* Sugarman, *"Pecuniary Formula" Marital Deduction Bequests: Application of Revenue Procedure 64-19,* 16 W. RES. L. REV. 257, 258-59 (1965); Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19,* 33 TENN. L. REV. 493, 496 (1966).

[11] *See* Lloyd 898; Weinstock, *The Marital Deduction—Problems and Answers Under Revenue Procedure 64-19,* 43 TAXES 340, 341-42 (1965).

[12] Even if there is no directive to make distributions in cash, the problem still remains because of the rule that, absent a provision empowering the executor to make distributions in kind, the marital bequest must be satisfied entirely in cash. *See, In re* Campbell's Will, 144 N.Y.S.2d 515 (Sur. Ct. 1955); *In re* Lazar's Estate, 139 Misc. 261, 247 N.Y. Supp. 230 (Sur. Ct. 1930); CASNER 814.

[13] If an asset has appreciated in value, the estate would be subject to an income tax on the recognized gain measured by the difference between the basis of the asset as determined by federal estate tax values, INT. REV. CODE of 1954, § 1014, and the amount realized from the disposition of the asset, INT. REV. CODE of 1954, § 1001. The basis of the asset as determined by federal estate tax values will be either the fair market value at the date of decedent's death, INT. REV. CODE of 1954, § 2031, or at the alternate valuation date, INT. REV. CODE of 1954, § 2032, which may be selected by the executor within certain prescribed conditions, CASNER, 810-12; Treas. Regs. § 20.2032 (1962). For a brief discussion of some considerations involved in selecting the alternate valuation date in terms of a hypothetical estate and one type of pecuniary formula, see Comment, *Choosing a Marital Deduction Formula Clause,* 44 MARQ. L. REV. 532, 535-36 (1961).

executor usually was granted the discretion to select the non-cash assets to fund the marital share in order to overcome the contention that distributions must be composed of a fractional share of each asset.[14]

Without a contrary provision in the instrument, the executor who makes an in-kind distribution is required to value the asset by its value as of the date of distribution.[15] Since the pecuniary interest bequest is viewed as providing the surviving spouse with a claim of a fixed dollar amount,[16] the distribution of assets will be treated as a "sale or exchange" by the estate.[17] Therefore, if a distributed non-cash asset were one that had appreciated, the estate would be subject to an income tax on the recognized gain.[18] In an attempt to circumvent this potential income tax to the estate,[19] executors were

[14] *See* Polasky 815; Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N. Y. Personal Property Law* § 17-f, 30 ALBANY L. REV. 262, 264 (1966).

[15] King v. Citizens & So. Nat'l Bank of Atlanta, Ga., 103 S.2d 689 (Fla. 1958); Boston Safe Deposit & Trust Co. v. Reed, 229 Mass. 267, 118 N.E. 333 (1918); Estate of Gauff, 27 Misc.2d 407, 211 N.Y.S.2d 583 (Sur. Ct. 1960).

[16] Once the value of the adjusted gross estate is established, the fixed dollar amount of the pecuniary interest bequest remains unaltered regardless of any appreciation or depreciation in the value of the estate's assets. Rev. Rul. 60-87, 1960-1 CUM. BULL. 286; Rev. Rul. 56-270, 1956-1 CUM. BULL. 325; Kohn, *supra* note 2, at 243.

[17] As a result of the "sale or exchange," the surviving spouse will take the assets by purchase and not by inheritance, thereby acquiring each asset with a basis equal to its fair market value at the date of distribution. Commissioner v. Brinckerhoff, 168 F.2d 436 (2d Cir. 1948); Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940); Sherman Ewing v. Commissioner, 40 B.T.A. 912 (1939); Treas. Reg. § 1.1014-4(a)(3) (1961).

[18] The recognized gain to the estate will be measured by the variance between the value of the asset as determined for federal estate tax purposes (the basis of the asset to the estate, note 13 *supra*) and the fair market value of the asset on the date of distribution (the basis of the asset to the surviving spouse). Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940); Suisman v. Eaton, 15 F. Supp. 113 (D.C. Conn. 1935), *aff'd sub nom.*, Suisman v. Hartford-Connecticut Trust Co., 83 F.2d 1019 (2d Cir.), *cert. denied*, 299 U.S. 573 (1936); Note, 4 TAX L. REV. 372 (1949); Rev. Rul. 60-87, 1960-1 CUM. BULL. 286; Rev. Rul. 56-270, 1956-1 CUM. BULL. 325; Treas. Reg. § 1.1014-4(a)(3) (1961).

[19] The possible income tax liability has lead some drafters to abandon the pecuniary interest formula in favor of the fractional share formula. See Durbin, *supra* note 5; Edwards 255; Lloyd 898-99. This latter formula guaranteed the surviving spouse a marital bequest of a certain fractional share of the decedent's estate which remained unaffected by any appreciation or depreciation in the estate's assets. The distributions under the formula were not viewed as a "sale or exchange" made in satisfaction of a definite dollar amount claim against the estate. Consequently, no gain or loss was realized with the attendant tax consequences. Rev. Rul. 55-117, 1955-1

empowered to use federal estate tax valuations (date of death or alternate valuation date) in valuing in-kind assets for distribution purposes.[20] This last innovation paved the way for great latitude in post-mortem estate planning by allowing the utilization of depreciated assets for distributions in kind.[21]

With this discretionary power, the executor has the option of allocating the appreciated assets and the depreciated assets between the surviving spouse and the other beneficiaries of the estate.[22] Assuming that the surviving spouse is amenable (she may have an independent source of income),[23] the executor could find the marital share with depreciated assets.[24] This particular distribution scheme would achieve many salutary results:[25] (1) the estate will escape any gain or loss on the distributions in kind because the valuations used for distribution purposes were federal estate tax values; (2) because federal estate tax values were used for distribution purposes,

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CUM. BULL. 223; Treas. Reg. § 1.1014-4(a)(3) (1961); *Report of Subcommittee on Estate Planning and the Marital Deduction,* 102 TRUSTS & ESTATES 934, 944-45 (1963).

[20] *See* Cox, *supra* note 5, at 930-32; Polasky 816-18, 865-67.

[21] See FARR 294-95.

[22] The following is illustrative of a pecuniary interest formula clause containing all of the features noted in text

> "If my wife, . . . shall survive me, I devise and bequeath to . . ., as Trustee, an amount equal to one-half(½) of the value of my adjusted gross estate as finally determined for federal estate tax purposes, less the aggregate amount of marital deductions, if any, allowed by reason of interests in property passing or which have passed to my wife otherwise than by the terms of this Article of my Will. My Executor shall have full authority and discretion to satisfy said bequest in cash or in kind, or partly in cash and partly in kind, and to select and designate, and to convey and assign to the Trustee of said Trust Estate the cash, securities, or other assets, including real estate or any interests therein, which shall constitute said Trust Estate; provided, however, that in no event shall there be included in said Trust Estate any asset or the proceeds of any asset with respect to which a marital deduction would not be allowable, if so included; and provided, further, that assets applied on said bequest in kind shall for such purposes be valued at the values thereof finally determined for the purposes of the federal estate tax on my estate. . . ."

Polasky 816-17.

[23] *See* Lloyd 899.

[24] Unfortunately, conflicts among the executor, surviving spouse and other beneficiaries do arise. *See* Edmonds, *Administrative Problems under Marital Deduction Clauses,* 89 TRUSTS & ESTATES 380, 381 (1950); Kiley & Golden, *A Residue Formula As an Aid to the Executor,* 90 TRUSTS & ESTATES 824, 826 (1951); Williams, *Avoiding Conflict of Interest in Marital Deduction Methods,* 90 TRUSTS & ESTATES 156 (1951).

[25] See Colson, *The Marital Deduction and Revenue Procedure 64-19,* 10 PRAC. LAW, 69, 72-74 (Oct. 1964); Lloyd 899.

a second evaluation of assets on distribution date will not be required, thereby easing the executor's administrative burden; (3) the executor will have satisfied the marital deduction bequest for which a credit will be given the estate; (4) the appreciated assets will have been given to the non-marital beneficiaries who very often are children in lower tax brackets; and (5) assuming the depreciated assets funded the marital share do not increase in value and are not disposed of, the surviving spouse's estate at death will be reduced, because these assets will be valued for purposes of the second estate at their depreciated values.[26]

This last feature of the estate planning scheme allows for a significant tax saving:[27] the dollar amount by which the assets funded the marital share have depreciated in value will escape taxation in either estate.[28] Consequently, the justification of the marital deduction, that a certain amount of assets would not be taxed to the first estate since an equivalent amount would be added to the surviving spouse's estate, clearly was being frustrated.[29] It is true that an executor might be subject to the rule that he must distribute

[26] *See* INT. REV. CODE of 1954, § 2031; Treas. Reg. § 20.2031-1(b) (1965); note 13 *supra*. Moreover, if the surviving spouse dies within ten years after the death of the predeceased spouse, the second estate may be diminished further by the credit allowed for previously taxed property. INT. REV. CODE of 1954, § 2013. *See* Bevan, *The Estate Tax Credit for Property Previously Taxed,* N.Y.U. 23RD INST. ON FED. TAX. 1117 (1965).

[27] A simple example of such post-mortem manipulation should suffice. Assume that the decedent's adjusted gross estate contains two assets, *A* stock and *B* stock, each valued at 100,000 dollars for federal estate tax purposes. On the date of distribution, the *A* stock has appreciated in value to 150,000 dollars and the *B* stock has depreciated in value to 50,000 dollars. Assume further that the surviving spouse is amenable to receiving depreciated assets from the estate. With the power posited by the instrument in the executor to satisfy the maximum marital deduction (which, under these hypothetical facts, would be 100,000 dollars) by distributions in kind of assets chosen by the executor using valuations determined for federal estate tax purposes, the executor may give the appreciated *A* stock to the non-marital beneficiaries and the depreciated *B* stock to the marital share. Assume the *B* stock maintains its depreciated value and is not disposed of before death. After starting with the decedent's adjusted gross estate of 200,000 dollars and subtracting the 100,000 dollars taxed to the decedent's estate and the 50,000 dollars taxed to the surviving spouse's estate, 50,000 dollars completely escapes taxation in either estate.

[28] For various examples illustrating the tax savings discussed in the text, see Golden, *Rev. Proc. 64-19: Implications for Attorneys and Fiduciaries,* 103 TRUSTS & ESTATES 536, 537 (1964); Polasky, 816-18; Sugarman, *supra* note 10, at 259; 43 N.C.L. REV. 459, 463 (1965).

[29] *See* Colson, *supra* note 25, at 73; Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19,* 33 TENN. L. REV. 493, 497 (1966).

impartially the appreciated and depreciated assets of the decedent's estate.[30] However, under the facts of the foregoing hypothetical, who among the surviving spouse and children is going to have the incentive to sue? No one normally,[31] and post-mortem manipulations of this character ultimately provoked the issuance of Revenue Procedure 64-19.[32]

The Scope of Revenue Procedure 64-19

Although much discussion has been generated because of the technical complexity and catastrophic nature of the Procedure,[33] its

[30] *See, e.g.,* Hall v. Commissioner, 150 F.2d 304 (10th Cir. 1945); Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135 (1919); Will of Rice, 150 Wis. 401, 137 N.W. 778 (1912); Lauritzen, *supra* note 9, at 318-19.

[31] *But see* note 24 *supra.*

[32] Warnings that pecuniary bequests using federal estate tax values might precipitate Treasury action came as early as 1951. Casner, *Estate Planning—Marital Deduction Provisions of Trusts,* 64 HARV. L. REV. 582, 593-97 (1951). *See* CASNER 815-16; Casner, *A Fiduciary's Powers and the Marital Deduction,* 100 TRUSTS & ESTATES 247, 248 (1961). These warnings and others raised serious questions about the manipulative schemes in addition to the avoidance of tax liability by diverting depreciated assets to the agreeable surviving spouse. If the executor were considered as having the power to divert property away from the surviving spouse, it was strongly argued that the marital deduction should be disallowed. *See* Cox, *supra* note 5, at 931-32; Sugarman, *supra* note 10, at 260; Treas. Reg. §§ 20.2056 (b)-5(a)(5), -5(j) (1964). It was also suggested that the executor's discretion might preclude a valuation of the amount of assets disposed of by the pecuniary bequest, thereby disqualifying such assets for the marital deduction. *See* COVEY, *supra* note 5, at 39. Furthermore, if viewed as a power of appointment, the exercise of the power by the executor might incur estate and gift taxes. *See* CASNER 814-16; Comment, *Choosing a Marital Deduction Formula Clause,* 44 MARQ. L. REV. 532, 538 (1961). After great anguish and a substantial amount of communication with the American Bar Association, the Treasury issued Revenue Procedure 64-19. *See* Peters, *Instance of ABA-IRS Cooperation,* 103 TRUSTS & ESTATES 908 (1964).

[33] *See, e.g.,* Alexander, *Revenue Procedure 64-19: The New Marital Deduction Rule,* 36 MISS. L.J. 485 (1965); Bassiouni, *The Marital Deduction Rule and Revenue Procedure 64-19,* 2 ILL. CONT. LEGAL ED. 89 (Oct. 1964); Cantwell, *Revenue Procedure 64-19: Statutory Relief,* 104 TRUSTS & ESTATES 953 (1965); Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problem,* 104 TRUSTS & ESTATES 69 (1965); Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317 (1964); Dalton, *General Review of Marital Deduction Planning,* 45 NEB. L. REV. 414 (1966); Durand, *Revenue Procedure 64-19: Planning Lessons from Marital Deduction Litigation,* 104 TRUSTS & ESTATES 943 (1965); Golden, *supra* note 29, Gradwohl, *supra* note 7; Hauser, *Latest Developments in Taxation of Estates and Trusts Raise New Caveats for Tax Man,* 21 J. TAX. 32 (1964); McKenney, *Revenue Procedure 64-19: Drafting Suggestions for Marital Deductions,* 104 TRUSTS & ESTATES 961 (1965); Mullin, *Revenue Procedure 64-19: Community Property Aspects,* 104 TRUSTS & ESTATES 957

area of impact is relatively small.[34] Various bequests are not within the purview of the Procedure because the manipulative vehicle, provided by the pecuniary interest bequest previously discussed, is not deemed present. It might be helpful to list these exempt bequests.

(1) The Procedure does not apply to a bequest of "specific assets."[35]

(2) The Procedure does not apply to a bequest "of a fractional share of the estate, under which each beneficiary shares proportionately in the appreciation or depreciation in the value of assets to the date, or dates, of distribution."[36] Draftsmen should be careful

(1965); Rogovin, *Revenue Procedure 64-19: Administrative History,* 104 TRUSTS & ESTATES 940 (1965); Rogovin, *The Sound and the Fury: Official Views on Revenue Procedure 64-19,* 104 TRUSTS & ESTATES 432 (1965); Smith, *New Marital Deduction Rule and Post October 1, 1964 Wills,* 37 WIS. B. BULL. 7 (Oct. 1964); Stevens, *How to Draft Marital Deduction Formula Clauses under Rev. Proc. 64-19,* 20 J. TAX. 352 (1964); Straus, *Revenue Procedure 64-19: When Should Agreements Be Made?,* 103 TRUSTS & ESTATES 911 (1964); Voss, *The Marital Deduction and Revenue Procedure 64-19,* 33 J. KAN. B. ASS'N 298 (1964); Weinstock, *supra* note 11, Wright, *supra* note 9; Wyshak & Wyshak, *Legislative Relief for Maximum Marital Deductions and 64-19,* 41 J. ST. B. CAL. 711 (1966); Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517 (1965); Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law § 17-f,* 30 ALBANY L. REV. 262 (1966); Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19,* 33 TENN. L. REV. 493 (1966); Note, *Revenue Procedure 64-19 and the Effect of State Court Treatment of Formula Clauses on the Executor's Dilemma,* 53 GEORGETOWN L.J. 791 (1965); Note, *The Estate Tax Marital Deduction-Revenue Procedure 64-19,* 41 IND. L.J. 711 (1966); 18 VAND. L. REV. 319 (1964).

[34] Although post-mortem manipulations provoked the issuance of Revenue Procedure 64-19, the Treasury stated that on technical grounds the Procedure was leveled at the pecuniary interest bequest under which "the interest in property passing from the decedent to his surviving spouse would not be ascertainable as of the date of death, if the property available for distribution included assets which might fluctuate in value." Rev. Proc. 64-19, § 2.03, 1964-1 CUM. BULL. 682, 683.

[35] Rev. Proc. 64-19, § 4.01(2), 1964-1 CUM. BULL. 682, 684. Although "*specific* assets" is the phraseology used, it would seem that a bequest of a class of property, such as "all the real estate I own," would escape the thrust of Revenue Procedure 64-19. *See* Sugarman, *supra* note 10, at 262.

[36] Rev. Proc. 64-19, § 4.01(1), 1964-1 CUM. BULL. 682, 684. This exemption is premised upon the conclusion that a fractional share clause, when coupled with the requirement that all beneficiaries, marital and non-marital, share proportionately in appreciation or depreciation of assets until distribution date, or dates, does not facilitate the same degree of manipulation as is possible with the pecuniary interest bequest. The difference results from the fact that the fractional share, determined by the use of federal estate tax values, becomes fixed once the adjusted gross estate and residuary estate are certain and remains unaltered in its application throughout the administration of the estate regardless of any change in asset values. Never-

when employing this exemption because the judicial interpretation which may be assigned to a particular bequest cannot always accurately be predicted, with the unsettling result that an intended fractional share[37] bequest may be construed to be an objectionable pecuniary interest bequest that effectuates loss of the entire marital deduction.[38]

(3) The Procedure does not apply to a pecuniary interest bequest, formula or non-formula, where any one of the following elements is present:[39] (a) the marital bequest is to be satisfied solely in cash;[40] *or* (b) the fiduciary has no discretion in the selection of assets to be distributed in kind;[41] *or* (c) the assets chosen by the

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theless, qualifying under this escape provision of the Procedure is not always as easy as might initially appear. Specifically, all fractional share bequests are not exempt, but only those "under which each beneficiary shares proportionately in the appreciation or depreciation in the value of assets to the date, or dates, or distribution." Rev. Proc. 64-19, § 4.01(1), 1964-1 CUM. BULL. 682, 684; Lloyd 899-900. Furthermore, although this exemption has been sanctioned presently, abusive utilization of any fractional share bequest similar to that found in the history of the pecuniary interest bequest may precipitate parallel proscriptions. *See* Lloyd 899-900.

[37] To its already substantial list of supporters (*see, e.g.* Durand, *supra* note 5, at 873-74; Durbin, *supra* note 5, at 545; Lovell, *supra* note 5, at 812-13; *Report of Subcommittee on Estate Planning and the Marital Deduction,* 102 TRUSTS & ESTATES 934, 945 (1963), the fractional share bequest garnered additional advocates subsequent to the promulgation of Revenue Procedure 64-19. *See* Alexander, *supra* note 33, at 491; Lauritzen, *supra* note 9, at 396; Lloyd 900; and Waters, *supra* note 9, at 370-71. One attractive feature of the fractional share bequest is that normally there is no gain or loss recognized on the distribution of assets since no fixed dollar amount is being satisfied. *See* note 19 *supra*; Kohn, *supra* note 2, at 244-45; Rev. Rul. 55-117, 1955-1 CUM. BULL. 233. However, under certain circumstances income tax liability to the estate and the surviving spouse may result. *See* Edwards 266-67. Furthermore, the fractional share bequest potentially poses serious administrative burdens, for example, the complexity of distributing assets in conformity with the fractional share. *See* Polasky, 844-56.

For excellent discussions of the fractional share bequest, see Durbin, *supra* note 5; Friedman & Wheeler, *Selection and Drafting of Marital Deduction Formula Clauses,* 106 TRUSTS & ESTATES 799 (1967).

[38] For comments on actual cases involving the issue of fractional share versus pecuniary interest, the executor's dilemma when faced with ambiguously phrased bequests, and suggested approaches in light of Revenue Procedure 64-19, see Polasky 857 & n.160; Wright, *supra* note 9, at 103-04; Note, *Revenue Procedure 64-19 and the Effect of State Court Treatment of Formula Clauses on the Executor's Dilemma,* 53 GEORGETOWN L.J. 791, 792-802 (1965).

[39] The presence of any one of the features enumerated in the text eliminates an essential ingredient in the post-mortem manipulation scheme previously discussed. See notes 21-32 *supra* and accompanying text.

[40] Rev. Proc. 64-19, § 4.01(3)(a), 1964-1 CUM. BULL. 682, 684.

[41] Rev. Proc. 64-19, § 4.01(3)(b), 1964-1 CUM. BULL. 682, 684.

fiduciary to be distributed in kind in funding the marital bequest must be valued at their respective values on the date, or dates, of their distribution.[42]

The mandates of Revenue Procedure 64-19 are aimed at the pecuniary interest clause where the following features are present: (1) a bequest of a certain pecuniary amount to qualify for the marital deduction; and (2) a clause that the fiduciary is required, or is given the discretion, to select the assets in kind to fund the marital bequest; and (3) a clause that, in valuing the assets for distribution purposes, the fiduciary shall use federal estate tax values.[43]

If all of the above elements are present,[44] the Procedure disallows the marital deduction in toto,[45] *unless certain prescribed con-*

[42] Rev. Proc. 64-19, § 4.01(3)(c), 1964-1 CUM. BULL. 682, 684. Where there is no indicia in a state's statutory or case law that, unless a contrary intent is expressed by the testator, the executor must distribute assets using date-of-distribution values, an official of the Internal Revenue Service has stated that "the Service will assume that the state will follow the general rule that assets are distributed at date of distribution values," thereby saving the marital deduction from the grasp of Revenue Procedure 64-19. Rogovin, *The Sound and the Fury: Official Views on Revenue Procedure 64-19,* 104 TRUSTS & ESTATES 432, 435 (1965).

[43] The purpose of this Revenue Procedure is to state the position of the Internal Revenue Service relative to allowance of the marital deduction in cases *where there is some uncertainty as to the ultimate distribution to be made in payment* of a pecuniary bequest or transfer in trust where the governing instrument provides that the executor or trustee *may* satisfy bequests in kind with assets at their value as finally determined for federal estate tax purposes.

Rev. Proc. 64-19, § 1, 1964-1 CUM. BULL. 682, 682-83 (emphasis added).

[44] For a sample pecuniary formula bequest containing the three features mentioned in the text, see note 22 *supra.* It should be noted that the Procedure's mandates can be triggered by either a formula or non-formula pecuniary bequest. Rev. Proc. 64-19, § 2.01, 1964-1 CUM. BULL. 682, 683. Technically, the Procedure applies to a cash bequest of a stated dollar amount when the bequest may be funded with assets in kind valued at federal estate tax values for distribution purposes. "However," one commentator has stated, "I have never seen or heard of such a legacy." Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317 (1964). This commentary evidences the fact that the pecuniary *formula* bequests will provide the principal target for the Procedure's mandates. *See* Comment, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 715 (1966).

[45] One might contend that the effect of the Procedure should be negated where the defective pecuniary interest bequest contains the following proviso: "Notwithstanding any other provision of this instrument I direct that my executor(s) (or my trustee(s)) shall not exercise any power or privilege granted by this instrument if and to the extent that the exercise thereof would adversely affect the allowance of the marital deduction." *See also* Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problem,* 104 TRUSTS & ESTATES 69, 70 (1965). However, an official of the Internal Revenue Service has stated that such a

ditions are met. Specifically, they are satisfied *if* "by virtue of the duties imposed on the fiduciary either by applicable state law or by the express or implied provisions of the instrument, it is *clear* that the fiduciary, in order to implement such a bequest . . . ,"

> 1. must distribute assets, including cash, having an aggregate fair market value at the date, or dates, of distribution amounting to *no less than* the amount of the pecuniary bequest or transfer, as finally determined for Federal estate tax purposes . . . , *or*
> 2. must distribute assets, including cash, *fairly representative of appreciation or depreciation* in the value of all property thus available for distribution in satisfaction of such pecuniary bequest or transfer . . . .[46]

Under either requirement number 1 (hereinafter referred to as the "no less than" distribution technique) or requirement number 2 (hereinafter referred to as the "net appreciation-depreciation" distribution technique), assets may still be valued according to federal estate tax values for the purpose of calculating the *amount* of the marital bequest.[47] However, date-of-distribution values are used to determine if the assets were distributed in compliance with these requirements.[48] Prior to a more extensive comparative analysis of

"boots-strap" clause will not place the instrument without the Procedure's purview. Rogovin, *supra* note 42, at 435; *IRS Chief Counsel Answers the Most Troublesome Questions on Rev. Proc. 64-19,* 22 J. TAX. 348, 351 (1965); *cf.* Commissioner v. Procter, 142 F.2d 824, 827-28 (4th Cir. 1944), *cert. denied,* 323 U.S. 756 (1944). Thus, the lethal nature of Revenue Procedure 64-19 must not be underemphasized: failure to pass muster under the Procedure's mandates results in loss of the *entire* marital deduction. Sugarman, *supra* note 10, at 264; Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19,* 33 TENN. L. REV. 493, 498 (1966). One commentator has stated that there is a "substantial likelihood" that the Procedure will be enforced by the courts. Colson, *supra* note 25, at 70. *But see* Note, 43 N.C.L. REV. 459, 468 (1965).

[46] Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683 (emphasis added).

[47] *See* Lloyd 898, 899 (1964). Although to date there is no statutory authority for allowing assets in kind to be valued at federal estate tax values for distribution purposes, Geller, *Revenue Procedure 64-19: "Variable" Pecuniary Bequests,* N.Y.U. 23RD INST. ON FED. TAX., 1157, 1161 & n.23 (1965), Revenue Procedure 64-19 facilitates the negative inference that aside from the marital deduction aspects, the Treasury will continue to sanction this fiduciary discretion. Furthermore, there is nothing inherent in the Procedure to indicate that the Service objects to using this valuation strategy to avoid potential income tax recognition when appreciated assets are distributed. *See* Geller, *supra,* at 1164.

[48] It should not be overlooked that, when the fiduciary is funding a bequest according to the terms of either distribution scheme, cash must be included with the distributable assets if the Procedure is to be satisfied. Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683.

the two distribution techniques,[49] it should be helpful to underline the pitfalls surrounding reliance on either approach.[50] The discussion will cover separately instruments executed before October 1, 1964, and those executed after September 30, 1964.

A. *Post-September 30, 1964, Instruments*

If the marital deduction is to be allowed under a post-September 30, 1964, instrument which contains the defective pecuniary bequest language, it must be "clear" that the fiduciary is required to distribute assets, including cash, according to the terms of *one and only one* of the distribution techniques.[51] The requisite directive to the fiduciary can be located in the express or implied provisions of the instrument *or* the state case law *or* a state statute, but in any event the directive must be "clear."[52]

Because the term is left undefined by the Procedure, resolving what *is* "clear" poses a continual problem.[53] For instance, the most striking example of what *is not* "clear" is provided by a Mississippi statute, subsequently repealed. The legislation declared that if the instrument embodied a proscribed pecuniary interest bequest, the fiduciary shall make such distributions by *either* the "no less than"

[49] *See* notes 91-249 *infra* and accompanying text.

[50] Due to the highly technical nature of Revenue Procedure 64-19 and the substantial number of instruments containing the defective pecuniary bequests language, officials of the Internal Revenue Service have attempted to provide answers to some of the anticipated problems surrounding the Procedure's application. *E.g.*, Rogovin, *Revenue Procedure 64-19: Administrative History*, 104 TRUSTS & ESTATES 940 (1965); Rogovin, *supra* note 42; Sheets, *Practical Solutions to 64-19: "Unofficial" Answers to Marital Deduction Questions*, 104 TRUSTS & ESTATES 71 (1965); *IRS Chief Counsel Answers the Most Troublesome Questions on Rev. Proc. 64-19*, 22 J. TAX. 348 (1965); *IRS Official Gives Views on Marital Deduction Clauses Under Rev. Proc. 64-19*, 22 J. TAX. 39 (1965); *Revenue Procedure 64-19: Panel Discussion*, 103 TRUSTS & ESTATES 917 (1964).

[51] Rev. Proc. 64-19, §§ 2.02, -.03, 1964-1 CUM. BULL. 682, 683; Sugarman, *"Pecuniary Formula" Marital Deduction Bequests: Application of Revenue Procedure 64-19*, 16 W. RES. L. REV. 257, 263-64 (1965).

[52] Rev. Proc. 64-19, §§ 2.02, -.03, 1964-1 CUM. BULL. 682, 683; text accompanying note 46 *supra*.

[53] For example, acceptance of the advice of counsel relative to an instrument's textual provisions may prove costly if the Service's interpretations should be contra. *See* Colson, *supra* note 25, at 75. Such unfortunate reliance on the advice of counsel might be occasioned by the "boot-straps" clause (note 45 *supra* and accompanying text) and by a mistaken construction as to whether a bequest were a fractional share or a pecuniary interest (notes 37-38 *supra* and accompanying text).

technique *or* the "net appreciation-depreciation" technique.[54] Furthermore, the Internal Revenue Service has stated that if the fiduciary is not restricted to *one and only one* of the techniques, distributions in conformity with either one of the two techniques shall be viewed as a hollow gesture, with the resulting forfeiture of the entire marital deduction.[55]

B. *Pre-October 1, 1964, Instruments*

When a pre-October 1, 1964, instrument contains defective pecuniary interest language, the marital deduction similarly will be honored by the Service if it is "clear" that in distributing assets, including cash, the fiduciary's discretion is limited to *one and only one* of the "no less than" and "net appreciation-depreciation" techniques.[56] Consequently, pre-October 1, 1964, instruments will pose problems identical to some of those encountered in dealing with post-September 30, 1964, instruments.[57] On the other hand, pre-October 1, 1964, instruments will present other pitfalls because with these latter instruments there are additional avenues through which

[54] MISS. CODE ANN. § 644.5 (Supp. 1964), repealed by Miss. Laws 1966, S.B. 1633. A new statute has been enacted which requires the executor to distribute assets under only the "net appreciation-depreciation" technique. MISS. CODE ANN. § 644.7 (Supp. 1967).

While the Procedure is somewhat less than "clear" in forbidding the degree of discretion sanctioned by the original Mississippi statute, it cannot be doubted that the remedial thrust of the Procedure is premised on the prohibition of this discretion and the attendant evil of post-mortem manipulation. *See* Covey, *supra* note 45, at 69. "The reason for the Service's position is obvious. If the rule were otherwise, the opportunity to minimize the amount passing to the widow, based upon events occurring after the decedent's death, would still be present through the use of requirement 1 ["no less than" technique] if the estate increased in value and requirement 2 ["net appreciation-depreciation" technique] if the estate decreased in value. As previously indicated, it is this opportunity to which the Procedure is directed." R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 47 (1966). Furthermore, it appears certain that the Procedure will be so enforced. See Alexander, *supra* note 33, at 492; Cohen, *Treasury Views on Current Questions*, 104 TRUSTS & ESTATES 9, 10 (1965). *Contra*, 18 VAND L. REV. 319, 322-23 (1964).

[55] Sheets, *supra* note 50 at 72; Lloyd 899. *But see* Note, N.C.L. REV. 459, 468 (1965). The Service's insistence on disallowing the marital deduction when the fiduciary's discretion is not clearly limited is premised on the conclusion that in such circumstances the interest in property passing to the surviving spouse is not ascertainable as of the date of death. Rogovin, *supra* note 42, at 432-34; Sheets, *supra* note 50, at 72. *See also* Jackson v. United States, 376 U.S. 503 (1964).

[56] Rev. Proc. 64-19, §§ 2.02, -.03, 1964-1 CUM. BULL. 682, 683; notes 53-55 *supra* and accompanying text.

[57] *See* notes 51-55 *supra* and accompanying text.

the marital deduction may be achieved within the strictures of the Procedure.[58]

Where the governing instrument is a will or a transfer in trust which can be amended and the maker is alive and competent, certain basic choices are available, each with its own distinct pitfalls.[59] Leaving the document unaltered will lessen the attorney's burden at present. Nevertheless, many commentators have advocated drafting new instruments whenever possible,[60] to achieve not only a greater likelihood of compliance with the Procedure but also a frequently needed general review and revision of the instrument.

The prospect of educating the client about the consequences of reexecuting a will, however, might prompt many attorneys to use a codicil.[61] Unfortunately, a misstep under this approach can have serious repercussions.[62] First, a poorly drafted amendment might not repair the instrument so as to conform to the "clear" mandate. Therefore, since the Procedure speaks in terms of writings "executed" before October 1, 1964,[63] any alteration might be construed as a republication of the instrument,[64] thereby removing it from the

[58] The availability of the various avenues will depend in varying degrees on the status of three principal factors: whether the maker is capable of reexecuting the will or transfer in trust, whether the provisions of the instrument or applicable state laws are "clear," and whether the maker is apprised of his alternatives in light of Revenue Procedure 64-19. For a discussion in outline form of the various alternatives available when a pre-October 1, 1964, instrument contains defective pecuniary bequest language, see Gradwohl, *Marital Deduction "Viewed as at the Date of the Decedent's Death,"* 45 NEB. L. REV. 457, 465-68 (1966).

Furthermore, the attorney may have an affirmative ethical duty to advise his client about the Procedure, a subsequent development which may adversely affect his desired disposition plan. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 210.

[59] *E.g.*, Gradwohl, *supra* note 58, at 465-68; Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations*, 63 MICH. L. REV. 809, 821-27 (1965); Sugarman, *supra* note 51, at 266-76.

[60] *See, e.g.*, Alexander, *supra* note 36, at 492; Colson, *The Marital Deduction and Revenue Procedure 64-19*, 10 PRAC. LAW, 69, 78 (Oct. 1964); Weinstock, *The Marital Deduction—Problems and Answers Under Revenue Procedure 64-19*, 43 TAXES 340, 344-46 (1965).

[61] *See, e.g.*, Golden, *Rev. Proc. 64-19: Implications for Attorneys and Fiduciaries*, 103 TRUSTS & ESTATES 536, 538 (1964).

[62] *See* Sugarman, *supra* note 51, at 271.

[63] Rev. Proc. 64-19, § 3.01, 1964-1 CUM. BULL. 682, 683-84; *See* Covey, *supra* note 44, at 321-22.

[64] It appears to be the law in North Carolina that a codicil acts as a republication with the result that the instrument thereafter speaks as of the date of the codicil. Young v. Williams, 253 N.C. 281, 116 S.E.2d 778 (1960); *In re* Coffield, 216 N.C. 285, 4 S.E.2d 870 (1939); Hatch v. Hatch 3 N.C. 32 (1798). For the law in other jurisdictions regarding the effect on an instru-

category of pre-October 1, 1964, documents.[65] Furthermore, the Procedure provides that, in the case of pre-October 1, 1964, instruments wherein the "clear" requirement is not satisfied by the instrument's provisions or applicable state law, the executor and surviving spouse may sign agreements, filed with the Internal Revenue Service, whereby the marital deduction is saved.[66] However, this escape provision is available *only* when a pre-October 1, 1964, instrument is involved.[67] Therefore, a poorly drafted codicil or trust amendment may create a double-edged sword.

Reliance on the agreements alone, however, is risky. Agreements may be employed *only* when the pre-October 1, 1964, instrument or the applicable state law is not "clear."[68] Distributions of property, including cash, must be made *only* under the "net appreciation-depreciation" technique.[69] Among other problems,[70] the executor must

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ment by the execution of a codicil, see Lauritzen, *Marital Deduction Bequests—Current Problems and Drafting Suggestions,* 8 TAX COUNSELORS Q. 125, 279 (1964).

[65] In anticipation that execution of a codicil might result in republication, the IRS has stated that it "will regard such [fiduciary's] powers as relating to the time the original will was executed, as long as the bequest is not mentioned in or in any way affected by the codicil." *IRS Chief Counsel Answers the Most Troublesome Questions on Rev. Proc. 64-19,* 22 J. TAX. 348, 351 (1965). However, there is no specification of phraseology which will guarantee qualification within the bounds of the formula "not mentioned in or in any way affected by . . . ."

[66] A form of agreement to be executed by the surviving spouse can be found in Rev. Proc. 64-19, § 5.01, 1964-1 CUM. BULL. 682, 684-85. A form of agreement to be executed by the executor or trustee can be found in Rev. Proc. 64-19, § 5.02, 1964-1 CUM. BULL. 682, 685.

An official of the Service has declared that the District Director may accept modifications in these agreements if such would be helpful in the audit of the return and does not change the substance of the basic agreement required. Sheets, *Determination of the Interest in Property Passing to the Surviving Spouse Required by Section 2056 of the Internal Revenue Code of 1954 and Revenue Procedure 64-19,* 46 CHI. B. RECORD 117, 121 (1964).

[67] Rev. Proc. 64-19, § 3.01, 1964-1 CUM. BULL. 682, 683-84.

[68] *Id.*; Gradwohl, *supra* note 58, at 467.

[69] Rev. Proc. 64-19, §§ 3.01, 5.01-.02, 1964-1 CUM. BULL. 682, 683-84. Therefore, the fiduciary will be faced with the dilemma created when the testator's intent is contrasted with the effect of the "net appreciation-depreciation" distribution technique, whereby the surviving spouse will receive a greater share of the assets if there is an appreciation in the aggregate value of the estate. Was the testator's predominant desire to limit the amount distributed to the surviving spouse or was it to achieve the marital deduction, notwithstanding the size of the amount received by the surviving spouse? *See* Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19,* 33 TENN. L. REV. 493, 501 (1966).

[70] *See* Stevens, *Revenue Procedure 64-19: Administrative Problems of Fiduciaries in Working with Formula Classes,* 104 TRUSTS & ESTATES 949

be certain that he has authority, either by state statute or a court adjudication, to enter into the requisite agreement.[71] Assuming the executor has authority,[72] there remains the problem of securing the surviving spouse's signature to the agreements.[73] Furthermore, distributions pursuant to the secured agreements, which require exclusive use of the "net appreciation-depreciation" method, will increase the fiduciary's administrative burdens.[74] Also, the fiduciary must be continually alert to the fact that if he fails to distribute as-

(1965); Straus, *Revenue Procedure 64-19: When Should Agreements Be Made?*, 103 TRUSTS & ESTATES 911 (1964); Sugarman, *supra* note 51, at 266-70.

[71] *See* Geller, *Revenue Procedure 64-19: "Variable" Pecuniary Bequests*, N.Y.U. 23RD INST. ON FED. TAX., 1157, 1167-68 (1965). To avoid a future lawsuit, the fiduciary might be wise to secure court approval of the agreement with all interested parties joined in the proceeding and, where necessary, with guardians appointed for minors, contingent interests and unascertained beneficiaries. *See* Colson, *supra* note 60, at 78.

[72] If the executor refuses to sign the required agreement, some commentators have expressed the view that the marital deduction may nevertheless be saved by the surviving spouse electing against the instrument where such action is sanctioned by state law. *See* Colson, *supra* note 60, at 79; Gradwohl, *supra* note 58, at 466-67. *But see* Treas. Reg. § 20.2056(e)-2(c) (1962). *See generally, The Estate Tax Marital Deduction: A Procrustean Bed of Perplexities*, 34 GEO. WASH. L. REV. 319, 341-43 (1965).

[73] In cases where the surviving spouse has died the Service has stated it will accept the signature of the surviving spouse's executor or legal representative. Sheets, *supra* note 50, at 72. Likewise when incapacitation is the obstacle, the Service will honor the signature of any authorized person by whose signing the surviving spouse would be bound. *Id.* However, the Internal Revenue Service is powerless to help when the surviving spouse is unwilling. The likelihood of such a posture is not remote. In an often repeated example, the surviving spouse is informed that if the agreements are not signed, the resulting higher taxes occasioned by the loss of the marital deduction will be paid by the residuary estate. The frequent response is, "How wonderful?" *See* Golden, *supra* note 61, at 539. North Carolina is one state in which, if the decedent did not make a testamentary provision to the contrary, the estate tax burden will fall entirely on the residuary estate. Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946). Consequently, the surviving spouse does not have the tax burden to provide a negative incentive to sign the agreement for the purpose of saving the marital deduction. However, such an impetus is present in twenty-two states where, absent a contrary testamentary provision, the estate tax is allocated among the beneficiaries according to their share. P-H FED. EST. & GIFT TAX REP. ¶¶ 120, 025-120, 026. *See generally* Durand, *Planning Lessons from Marital Deduction Litigation*, 101 TRUSTS & ESTATES 8 (1962).

[74] *See* Sugarman, *supra* note 51, at 266-70. Pursuant to the agreement, the fiduciary must file with the District Director, within six months after the last distribution in satisfaction of the marital deduction bequest, a schedule presenting the marital distributions made subsequent to the date of the agreement, the assets, including cash, available for distribution at each distribution date, and the fair market value of each asset at distribution date. Rev. Proc. 64-19 § 5.02, 1964-1 CUM. BULL. 682, 685.

sets according to the agreements and the surviving spouse receives less than the amount required thereunder, a gift will be considered as having been made by the surviving spouse to the other beneficiaries in whose favor the failure occurred.[75]

In an attempt to avoid the loss of the entire marital deduction and also the aforementioned pitfalls under both pre-October 1, 1964, and post-September 30, 1964, instruments, some states have undertaken a reappraisal of their state law with a view toward satisfying the "clear" requirement.

THE STATUS OF "APPLICABLE STATE LAW"

At the time of the Procedure's issuance, the "clear" requirement was not satisfied unequivocally by the law of any state, either decisional or statutory.[76] Furthermore, a review of current state law

[75] *Id.* at § 3.02, 684. It should be noted that signing of the agreements does not itself constitute a gift. *Id.* at § 3.01, 683-84. Furthermore, the gift tax liability can be vitiated if, when apprised of the fact, the surviving spouse makes seasonable objection and initiates appropriate state law procedure to rectify the situation. *Id.* at § 3.02, 684. For discussions concerning when the surviving spouse might be subject to a gift tax, see Rogovin, *The Sound and the Fury: Official Views on Revenue Procedure 64-19,* 104 TRUSTS & ESTATES 432, 434 (1965); *IRS Chief Counsel Answers the Most Troublesome Questions on Rev. Proc. 64-19,* 22 J. TAX. 348, 349-50 (1965).

[76] Although the law of no state clearly complied with the Procedure when issued, three states—New York, Oregon and Illinois—had judicial determinations which many felt might be held to require exclusive use of the "net appreciation-depreciation" technique, thereby saving the marital deduction.

New York had case law to the effect that under a pecuniary interest bequest where in-kind distributions were to be made at federal estate tax values, the distributions nevertheless were to be made so that all beneficiaries "shall share proportionately in the appreciation and in the depreciation. . . ." *In re* Bush's Will, 2 App. Div. 2d 526, 156 N.Y.S.2d 897, 901, *aff'd,* 3 N.Y.2d 908, 145 N.E.2d 872, 167 N.Y.S.2d 927 (1956). *Accord,* Matter of Inman, 22 Misc. 2d 573, 196 N.Y.S.2d 369 (Surr. Ct., N.Y. County 1959). In 1965, however, the New York legislature enacted a statute denominating the "no less than" technique as the applicable state law. N.Y. PERS. PROP. LAW § 17-f(2)(b) (1965).

It has been suggested that the Oregon case of *In re* Nicolai's Estate, 232 Ore. 105, 373 P.2d 967 (1962), possibly might satisfy the "clear" requirement via the "net appreciation-depreciation" technique. *See* R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 47 (1966); Cantwell, *Procedure 64-19: Statutory Relief,* 104 TRUSTS & ESTATES 953 (1965). However, instead of stating that ratable sharing was required under a defective pecuniary interest bequest, the court grappled with the instrument's phraseology—"a portion of my estate"—and concluded it specified a fractional share bequest, with the logical effect that sharing in appreciation or depreciation was required. Furthermore, in its determination, the court relied heavily on the testator's intent as opposed to an implementation of specific state law. *See Report of Committee on Administration and Distribution of Decedent Estates,* 104 TRUSTS & ESTATES 976, 983 (1965). There-

reveals a surprisingly small segment of relevant law which complements Revenue Procedure 64-19 in an attempt to lessen its impact.[77] To date only seventeen states have responded to the Procedure, all through the avenue of their legislatures.[78] A brief description of these statutes should provide the necessary background for a comparative examination of the three basic types that have emerged.

The "net appreciation-depreciation" distribution technique presently is embodied in the statutes of fourteen states.[79] Modeled after the language of the Procedure, this technique directs the fiduciary to fund the marital bequest with assets, including cash, which are fairly representative of the net appreciation or net depreciation of all

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fore, it can be persuasively argued that the case is limited to its facts as a construction of only one instrument containing the language "a portion of my estate," gives no reliable indication of what the result would be if the court were confronted with terminology which it classified as true pecuniary interest bequest language, and represents only one of a long line of cases where the pecuniary-fractional share question must be resolved.

The unreported Illinois case of Estate of Kircheimer, Ill. Probate Ct., Cook County, July 13, 1964, file No. 56 P. 8017, likewise might be considered as qualifying under the applicable state law provision. Indeed, an official of the Internal Revenue Service has made an "unofficial" statement to this effect. Sheets, *supra* note 66, at 119. *Contra,* Bassiouni, *The Marital Deduction Rule and Revenue Procedure 64-19,* 2 ILL. CONT. LEGAL ED. 89, 93 (Oct. 1964). This case, however, seemingly is vulnerable to the same attacks aimed at the Oregon decision. Furthermore, the fact that the Illinois adjudication was rendered by an inferior state court would appear to caution against reliance thereon when the marital deduction is at stake.

[77] The caution often is raised that careful thought should proceed and accompany any attempt to legislate curative measures premised on tax considerations when the effect also might be a radical alteration in the testator's desired distribution plan. At least such enactments should provide an escape mechanism "when the instrument provides to the contrary." *See* Polasky 885.

[78] Alabama, ALA. CODE tit. 58, § 7(3) (Supp. 1965); Arkansas, ARK. LAWS 1967, Act 209; California, CAL. PROB. CODE § 1029 (Supp. 1967); Colorado, COLO. REV. STAT. ANN § 153-10-49 (enacted by Colo. Laws 1965, ch. 327); Florida, FLA. STAT. ANN. § 734.031 (Supp. 1966); Georgia, GA. LAWS 1967, H.B. 54; Maryland, MD. ANN. CODE art. 93, § 392 (Supp. 1967); Minnesota, MINN. STAT. ANN. § 525-528 (Supp. 1966); Mississippi, MISS. CODE ANN. § 644.7 (Supp. 1967); New York, N.Y. PERS. PROP. LAW § 17-f(2)(b); North Carolina, N.C. GEN. STAT. § 28.158.1 (Supp. 1965); Ohio, OHIO REV. CODE § 1339.41 (Page Supp. 1967); South Carolina, S.C. CODE ANN. § 19-567 (Supp. 1967); Tennessee, TENN. CODE ANN. 64-71.2(b) (Supp. 1966); West Virginia, W. VA. CODE § 44-5.12 (Supp. 1967); Wisconsin, WIS. STAT. ANN. §§ 231.55, 318.5 (Supp. 1967).

A proposed statute in Connecticut was rejected apparently due to opposition by the Connecticut Bankers and Bar Associations. *See* Cantwell, *supra* note 76, at 953.

[79] Alabama, Colorado, Florida, Georgia, Maryland, Minnesota, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin. For the citations to the statutory enactments of these fourteen states, see note 78 *supra.*

assets thus available for distribution, no more and no less.[80] Therefore, his discretion to select non-cash assets, as granted by the instrument,[81] is severely circumscribed, specifically preventing a diversion of either appreciation or depreciation away from or to the surviving spouse. While the *interest* acquired by the surviving spouse is fixed, the *amount* required to be given the marital bequest will fluctuate throughout the estate's administration and ultimately will be determined only with a winding up of the estate.[82] This distribution technique has the practical effect of converting a pecuniary bequest into a fractional share formula,[83] absent the requirement that the surviving spouse receive a pro-rata fraction of each asset.

Another type of applicable state law originating in the language of the Procedure itself is the "no less than" technique, which presently is employed only by two states, each by statute.[84] This distribution approach imposes one additional requirement upon the instrument's provisions: the *aggregate date-of-distribution* value of assets, including cash, received by the surviving spouse must be no less than the amount of the marital deduction, as finally determined under the instrument's terms using federal estate tax values.[85] Therefore, while there is a minimum or "floor" amount that must be funded to the marital share, this technique neither forbids nor compels the fiduciary to distribute assets the aggregate date-of-distribution value of which is greater than the "floor."[86] This potential latitude facilitates a degree of post-mortem estate planning which

[80] Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683.

[81] A typical pecuniary interest bequest empowering the fiduciary to make distributions in kind is set out at note 22 *supra*.

[82] *See* Rogovin, *supra* note 75 at 432-33.

[83] *See* Sugarman, *"Pecuniary Formula" Marital Deduction Bequests: Application of Revenue Procedure 64-19*, 16 W. RES. L. REV. 257, 273-74 (1965); Comment, *Drafting Solutions to Rev. Proc. 64-19*, 9 ST. LOUIS U.L.J. 517, 524 (1965).

[84] Arkansas and California. See note 78 *supra*.

[85] Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683.

[86] *See* Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problem*, 104 TRUSTS & ESTATES 69, 70 (1965); *The Estate Tax Marital Deduction—Revenue Procedure 64-19*, 41 IND. L.J. 711, 721 (1966). The interaction, however, of the instrument's directives and the "no less than" mandate sometimes might necessitate funding the marital share with assets the aggregate date-of-distribution value of which is in excess of the "floor." For example, if all the distributable assets have appreciated, satisfaction of the instrument's requirement that the amount of the marital bequest be calculated by federal estate tax values by definition will cause the aggregate distribution date value of the marital share to exceed the "floor."

is circumscribed somewhat under the "net appreciation-depreciation" technique, where there must be strict compliance with the requirement of assets "fairly representative" of the estate's changing aggregate value.

The third, and last, type of state law satisfying the "clear" mandate is merely an adaptation of the "no less than" technique and is utilized only by New York, by statute.[87] Under this approach, the aggregate date-of-distribution value of distributable assets must be no less than, as well as no more than, the amount of the marital bequest as determined by the instrument's provisions. The net result of this technique, hereinafter referred to as "equal to," is that the surviving spouse must receive assets, including cash, the aggregate date-of-distribution value of which is precisely equal to the marital bequest. Therefore, the latitude in post-mortem estate planning occasioned by the "no less than" method is eliminated,[88] and the resulting restriction on the fiduciary's discretion to an exact date-of-distribution dollar amount is similar in effect to the "net appreciation-depreciation" approach.

There are features common to the three distribution techniques, all of which guarantee the surviving spouse a dollar amount sufficient to procure the maximum marital deduction as ascertained by reference to the instrument's provisions. Pursuant to the mandates of the Procedure, cash must be included in the distributable assets when calculations are made as to the amount the surviving spouse should receive.[89] Federal estate tax values are used to achieve compliance with the directives of the instrument.[90] Nevertheless, in conforming

[87] N.Y. PERS. PROP. LAW § 17-f(2)(b). The New York statute, although falling within the "equal to" classification, does not denominate a true "equal to" technique. The fiduciary is directed to fund the marital share with assets the aggregate date-of-distribution value of which is "no less than, and *to the extent practicable to no more than* . . ." the marital bequest as determined by the instrument's provisions. In all likelihood, this modicum of fiduciary discretion sometimes will result in the aggregate date-of-distribution value given the surviving spouse not being exactly "equal to" the marital bequest. For comments on these and other aspects of the New York statute, see R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 18-19 (Supp. 1967); Cantwell, *supra* note 76, at 954; Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law § 17-f*, 30 ALBANY L. REV. 262 (1966).

[88] *See* notes 84-87 *supra* and accompanying text.

[89] Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683; *see* note 46 *supra* and accompanying text.

[90] *See* note 47 *supra* and accompanying text.

to the Procedure, all three techniques impose supplemental requirements upon the instrument's distribution plan, which requisites must be fulfilled by the utilization of date-of-distribution values.

Some distinctive differences among the three methods are readily apparent, however. In regard to possible net appreciation or net depreciation of the estate's distributable assets, the surviving spouse *cannot* participate in any increase or decrease under the "equal to" approach, *may* participate under the "no less than" method, and *must* do so under the "net appreciation-depreciation" technique. Consequently, while the fiduciary has some discretion in making distributions in excess of the "floor" under the "no less than" plan, the remaining two distribution techniques require strict compliance with a specific date-of-distribution figure ascertained after the requisite calculations are made. A broader comparative analysis of these and other features hopefully will furnish the needed foundation for recommending which technique a state should adopt in response to Revenue Procedure 64-19.

A Comparison—Advantages and Disadvantages

The ensuing discussion will focus on the three types of applicable state law and will leave aside the related, but separate, problem of drafting clauses that will pass muster under Revenue Procedure 64-19.[91] Attention will be directed to seven considerations: (1) ease of administration; (2) income taxes to the estate; (3) income tax to the surviving spouse; (4) basis of asset to surviving spouse; (5) charitable remainder deduction; (6) post-mortem estate planning; (7) decedent's intent.

1. *Ease of Administration*

One administrative advantage which is equally present in all three distribution methods is that the fiduciary has some discretion

[91] For discussions of the various clauses that should qualify under the Procedure, see R. Covey, *supra* note 87; Farr 297-303; Alexander, *Revenue Procedure 64-19: The New Marital Deduction Rule,* 36 Miss. L.J. 485, 494-98 (1965); Ellick, *Forms of Marital Deduction Gifts, Formula and "Back-Up" Clauses,* 45 Neb. L. Rev. 468 (1966); Lloyd 898; McKenney, *Revenue Procedure 64-19: Drafting Suggestions for Marital Deductions,* 104 Trusts & Estates 961 (1965); Stevens, *How to Draft Marital Deduction Formula Clauses under Rev. Proc. 64-19,* 20 J. Tax. 352 (1964); Voss, *The Marital Deduction and Revenue Procedure 64-19,* 33 J. Kan. B. Ass'n 298, 301 (1964).

in selecting the assets to be distributed.[92] Specifically, even though the surviving spouse has a dollar claim against the estate under all three techniques, a claim to an interest in any particular asset of the estate is not also granted.[93] Therefore, a pro-rata division of any asset will result from fiduciary discretion and not the legitimate demands of the beneficiaries. It is clear that although the "net appreciation-depreciation" method is similar in many respects to the fractional share bequest, that clause's demand for fractionalization of individual assets is not applicable.[94] Furthermore, the fiduciary's discretion in selecting assets under any one of the techniques facilitates the funding of assets with high growth potential away from the surviving spouse for the purpose of avoiding the increased tax on the second estate.[95]

There are some administrative burdens which are common to all three distribution plans. First, the problem of allocating income earned during the period of administration between the marital and non-marital shares, one of the most vexing duties confronting a fiduciary, will be present in the administration of an estate subject to any one of the three methods.[96] Second, the bothersome requirement inherent in any pecuniary interest bequest will be applicable to these techniques: varying with particular states, the marital share normally must be preferred in order of satisfaction[97] and must be funded within a limited period of time (usually one year) or be granted interest from that date.[98]

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[92] For some this discretion may be viewed as a handicap as it only facilitates the occasion for bickering among beneficiaries as to particular distributions. *See* notes 95, 99-103 *infra* and accompanying text.

[93] *See* Stevens, *supra* note 91, at 354-55.

[94] *See* Comment, *The Marital Deduction—Effect of Revenue Procedure 64-19*, 33 TENN. L. REV. 493, 505 (1966).

[95] *See* Sugarman, *supra* note 83, at 275. However, the fiduciary's ability to allocate assets with varying growth potential causes some to view this discretion as a disadvantage since it only creates greater opportunities for objections by beneficiaries. *See* Golden, *Rev. Proc. 64-19: Implications for Attorneys and Fiduciaries*, 103 TRUSTS & ESTATES 536, 538 (1964).

[96] The guidelines for allocation of income earned during the period of administration are often embodied in state law. *See generally* R. COVEY, *supra* note 87, at 13-25; Abernathy, *Is It Income or Principal?: Allocating Yield from Property Consumed in Administration*, 95 TRUSTS & ESTATES 412 (1956); Bronston, *State and Federal Taxation: Tax Problems of Formula Type of Marital Deduction Bequest*, 96 TRUSTS & ESTATES 887, 887-88 (1957).

[97] *See* Edwards 259-60, 263.

[98] In North Carolina pecuniary legacies must be funded generally within one year of the decedent's death and, if not paid within this period, interest

There are two administrative burdens which are present in all three techniques, but with differing degrees of severity. The fiduciary will always be subject to the attack that his distributions have not been properly tailored to the particular technique. These complaints will take various forms and can originate with either the Service or the beneficiaries. For example, once the fiduciary has satisfied the IRS by funding the "floor" amount under the "no less than" approach, there remains the bickering among the beneficiaries as to what amount, if any, should be funded the marital share in excess of the "floor."[99]

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begins to accrue therefrom. Shepard v. Bryan, 195 N.C. 822, 143 S.E. 835 (1928); Moore v. Pullen, 116 N.C. 284, 21 S.E. 195 (1895); Hart v. Williams, 77 N.C. 426 (1877). For the law of other states respecting time of payment and interest, see T. ATKINSON, WILLS 751-53 (2d ed. 1953); 6 BOWE-PARKER: PAGE ON WILLS §§ 59.11 -.12 (rev. treatise 1962).

It might be contended, especially in regard to the "net appreciation-depreciation" method, that the state law in conformity with the Procedure has effectuated such a significant metamorphosis in the instrument's provisions that the hybrid result is not a pecuniary interest bequest. However, any such argument would seem to overlook the nature of the transfiguration. It does not appear that the applicable state law supplants the whole instrument; it merely superimposes an additional requirement on the existing distribution plan. Consequently, the instrument's demand for an exact dollar amount calculated by reference to federal estate tax values must still be fulfilled. (*See* Polasky 827-33, where the author in discussing the operation of the "no less than" and "net appreciation-depreciation" techniques acknowledges that the conditions of the pecuniary interest bequest must be satisfied notwithstanding the Procedure's mandates). Therefore, its pecuniary nature, however mangled, remains viable, thereby qualifying under the requirement of rapid payment or consequent interest.

[99] The state law employing the "no less than" technique could have a preemptive effect in the area, thereby leaving unfettered the fiduciary's discretion to make distributions in excess of the "floor." If this is not clearly the case, a beneficiary desiring to influence the distribution result might be able to invoke the rule of impartiality. *See* Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135 (1919); Lauritzen, *The Marital Deduction: Analysis of Treasury Ruling on Pecuniary Formula Bequests,* 103 TRUSTS & ESTATES 318 (1964); Durand, *Revenue Procedure 64-19: Planning Lessons from Marital Deduction Litigation,* 104 TRUSTS & ESTATES 943, 945 (1965); note 30 *supra* and accompanying text. Furthermore, a state's decisional law might nevertheless require the surviving spouse to share in appreciation or depreciation of the estate even under the "no less than" technique, forcing distributions to vary from the "floor" amount. This development likewise could occur with the "equal to" method. For example, even though New York now has a statute requiring an "equal to" approach, will the fiduciary nevertheless be subject to *In re* Bush's Will, 2 App. Div. 2d 526, 156 N.Y.S.2d 897, *aff'd,* 3 N.Y.2d 908, 145 N.E.2d 872, 167 N.Y.S.2d 927 (1956) (note 76 *supra*), where the court required proportional sharing of appreciation under an instrument where federal estate tax values were used for distribution purposes? *See* Polasky 885 n. 276; Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law* § *17-f,* 30 ALBANY L. REV. 262, 269-71 (1966).

Many objections to the fiduciary's actions will involve the question of the valuations placed on certain assets. With the "net appreciation-depreciation" method, this type of complaint from the Service and the beneficiaries likely will be identical in nature, but often with antipathetic viewpoints. Assuming amicable family relationships where a reduction in the surviving spouse's estate is desired,[100] the family will be claiming over-valuation of non-marital assets and under-valuation of marital assets in order to give the spouse as little in fact as possible. Meanwhile, the Service will be resisting this contention or claiming the opposite appraisal,[101] at the same time looking for the foundation upon which to impose a gift tax on the surviving spouse.[102]

Side by side with the administrative burden of defending values assigned is the duty to value the assets in the first place, and the number of separate valuations required will vary among the three techniques. All of the estate's assets will have to be appraised at least once for federal estate tax purposes, of course, as well as for compliance with the provisions in the will. Compliance with the mandates of the three techniques, however, will require additional valuations.[103]

Under the "equal to" approach, second valuations will be necessary only for those assets funded in satisfaction of the marital share.

[100] For discussion concerning instances where there is a lack of agreement between the surviving spouse and the other beneficiaries, see Durand, *supra* note 99, at 943.

[101] *See* Hauser, *Latest Developments in Taxation of Estates and Trusts Raise New Caveats for Tax Men*, 21 J. TAX. 32, 33 (1964); Sugarman, *supra* note 83, at 273.

[102] In regard to the specific situation where the surviving spouse does not receive the required proportionate share of appreciation, the Service has already indicated that a gift tax will result. Rogovin, *supra* note 75, at 434-35; Sheets, *Practical Solutions to 64-19: "Unofficial" Answers to Marital Deduction Questions*, 104 TRUSTS & ESTATES 71, 72 (1965).

[103] For federal estate tax purposes, the fiduciary may elect to value the assets at the date of the decedent's death, INT. REV. CODE of 1954, § 2031, or at the alternate valuation date, INT. REV. CODE of 1954, § 2032. Under this latter alternative, it is the normal rule that assets are valued one year from the date of the decedent's death, except that "in the case of property distributed, sold, exchanged, or otherwise disposed of, within 1 year after the decedent's death such property shall be valued as of the date of distribution, sale exchange or other disposition." *Id.* at § 2032(a)(1). Therefore, to the extent that property is "sold, exchanged, or otherwise disposed of, within 1 year after the decedent's death," the elective alternate valuation date allows the disposal date value to satisfy the valuation requirements of both the instrument and applicable state law, thereby reducing the multi-valuations necessary in administering the estate.

This same pattern will be followed with the "no less than" method,[104] save when distributions are made above the "floor" such as where a local law requires equitable sharing of appreciation in the estate.[105] However, due to the twin valuation requisites of the instrument and state law,[106] the second valuation problem under the above two techniques will manifest itself differently where there has been net appreciation or net depreciation in the estate's assets. Three plausible hypotheticals should sufficiently illustrate the variance.

First, where *slight net appreciation or depreciation* has occurred and some assets have decreased in value and others have increased, employment of both the "equal to" and "no less than" approaches will result almost invariably in second valuations of a large percentage of the estate's assets. This situation will arise even though all appraised assets are not distributed to the surviving spouse. The necessity for a significant number of second valuations will be created by the usual desire to make such selections for the marital share that the appreciated assets can be balanced off against depreciated ones. In this manner, the fiduciary hopefully will be able to distribute assets with both federal estate tax values and date-of-distribution values equivalent to the marital deduction without the conversion of assets to cash.[107] The exact date-of-distribution value requirement under the "equal to" method will intensify the problem in comparison to the "no less than" technique where the fiduciary is not restricted to the "floor."

Second, a situation might arise where *substantial net depreciation* has occurred and aggregate date-of-distribution values barely exceed the "floor" amount (which figure is identical to the exact amount required to be distributed under the "equal to" method). In this instance, it would appear that the Procedure's requisites will take precedence over the instrument's provisions.[108] Therefore, under both techniques the fiduciary would have to fund the marital share with a larger percentage of the estate's assets to arrive at the

[104] *See* Edwards 262-63.

[105] *See* note 99 *supra.*

[106] *See* text accompanying notes 90-91, *supra*; *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 724 (1966).

[107] *See* Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517, 523 (1965). For discussion regarding the disadvantages of converting assets to cash, see notes 130-31 *supra* and accompanying text.

[108] *See* Edwards 263; Sheets, *supra* note 102, at 71.

"floor" amount, notwithstanding the fact that the aggregate federal estate tax values of the distributed assets exceed the marital bequest.[109] The result should be the same even if the aggregate date-of-distribution values were equivalent to or less than the marital share. This increased quantity of second valuations will not arise often in this era of gradual, and sometimes rapid, inflation.[110] However, if substantial net depreciation occurs, the Service has indicated that the full marital deduction will nevertheless be allowed for federal estate tax purposes.[111]

The third situation is where there has been *substantial net appappreciation* and the aggregate date-of-distribution values of the *least appreciated assets* exceed the "floor" and the aggregate federal estate tax values of the same assets are below this figure.[112] First, there will have to be an increased number of second valuations in order to discern the least appreciated assets desirable for distribution to the surviving spouse. Secondly, there is the prospect of converting the assets into cash to approach the "floor" amount. Both problems can be negated to some extent under the "no less than" method where the fiduciary is not restricted to the "floor," assuming the absence of a local law requiring equitable sharing in appreciation.[113] However, the "equal to" technique will demand that distributions be tailored to an exact amount; therefore ascertaining the least appreciated assets will require a greater volume of second valuations to vitiate as much as possible the necessity of forced sales.[114]

Although a significant number of second valuations will thus be required under the "equal to" and "no less than" methods, this administrative burden will present a more formidable obstacle

[109] *See* Hauser, *supra* note 101, at 33; Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517, 524 (1965).

[110] See Durand, *supra* note 99, at 944, where the author uses actual stock market fluctuations in illustrating the effects on the marital share as a result of rapid rises and declines in stock prices.

[111] Sheets, *Determination of the Interest in Property Passing to the Surviving Spouse Required by Section 2056 of the Internal Revenue Code of 1954 and Revenue Procedure 64-19,* 46 CHI. B. RECORD 117, 119 (1964); Sheets, *supra* note 102, at 71.

[112] *See* Smith, *New Marital Deduction Rule and Post October 1, 1964 Wills,* 37 WIS. B. BULL. 7, 11-12 (Oct. 1964).

[113] *See* note 99 *supra.*

[114] The question of mandatory conversion of assets to cash will be discussed subsequently within a more expanded framework. *See* notes 130-35 *infra* and accompanying text.

under the "net appreciation-depreciation" technique.[115] Since the surviving spouse must receive assets which are "fairly representative of appreciation or depreciation,"[116] second valuations of *all* distributable assets is mandatory,[117] except where the often undesirable alternative of pro-rata distributions is pursued.[118] The burdensome nature of the fiduciary's administrative duty becomes readily apparent when two factors are considered: partial non-pro-rata distributions and the twin mandates of the instrument and relevant state law.

When partial non-pro-rata distributions are made, second valua-

[115] *See generally* Polasky 827-33; Sugarman, *supra* note 83, at 273-74.

[116] The Procedure's directive—"the fiduciary must distribute assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution"—is susceptible of a variety of interpretations. Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683. First, does this terminology specify that *each* asset received by the surviving spouse must mirror the percentage of appreciation or depreciation that has occurred in the value of the estate? Obviously, this is not the import of the language; such a directive would require each asset to appreciate or depreciate to the same degree as the entire estate, a result which is highly improbable with in-kind assets and impossible with cash assets where there is any change in value of the estate. Second, does this language mean that each time a distribution is made, the surviving spouse *must* receive assets which, taken together, reflect the then appreciation or depreciation in the assets available for distribution. *See* Ellick, *supra* note 91, at 479. Implicit in statements by officials of the Service is a rejection of both these constructions. Instead, the IRS makes what appears to be the most logical interpretation: the total quantity of assets received by the surviving spouse during the administration of the estate and by way of its termination must reflect the total appreciation or depreciation in the value of the estate that has occurred during this same period. *See* Sheets, *supra* note 111, at 120-22; *IRS Chief Counsel Answers the Most Troublesome Questions on Rev. Proc. 64-19,* 22 J. TAX. 348, 349-50 (1965).

[117] The Procedure states that in implementing the "net appreciation-depreciation" technique, "the fiduciary must distribute assets, including cash, fairly representative of appreciation or depreciation in the value of all property *thus available* for distribution . . . ." Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683 (emphasis added). An official of the Service has stated that the terminology "thus available" was used to denote the property which came into the control of the fiduciary. Sheets, *supra* note 102, at 71-73. Therefore, assets such as interests in trusts and jointly held property, which do not come into the fiduciary's hands, will not be considered in calculating proportional sharing by the surviving spouse. *Id.*

[118] A pro-rata distribution will, by definition, guarantee the surviving spouse's proportional sharing in appreciation or depreciation, and therefore a second valuation is not required. *See* Rogovin, *The Sound and the Fury: Official Views on Revenue Procedure 64-19,* 104 TRUSTS & ESTATES 432, 435 (1965); *Revenue Procedure 64-19: Panel Discussion,* 103 TRUSTS & ESTATES 917, 920 (1964). Unfortunately, however, a pro-rata distribution frequently is undesirable, for example, in the case of close corporation stock or real estate. *See* Edwards 266, 269-70.

tions will be required not only for the distributed assets but also for *all* remaining assets.[119] As with the readjustment of the fraction under the fractional share bequest, similarly the surviving spouse's proportional share must be recalculated when disproportionate distributions are made.[120] For example, assume an adjusted gross estate worth 2,000,000 dollars at federal estate tax valuation date and a marital bequest of 1,000,000 dollars (one-half of the adjusted gross estate). Before final distribution and when the estate's assets total 4,000,000 dollars, assets equalling 800,000 dollars are distributed to non-marital beneficiaries. At this time, the net estate value is 3,200,000 dollars while the surviving spouse's share is 2,000,000 dollars. Assume further that no more partial distributions are made and that the value of the estate is 6,400,000 dollars at final distribution date. Therefore, the surviving spouse's proportional share is 5/8 (2,000,000 dollars/3,200,000 dollars) of 6,400,000 dollars, or 4,000,000 dollars; the non-marital share is 3/8 (1,200,000 dollars/3,200,000 dollars) of 6,400,000 dollars, or 2,400,000 dollars.[121] Therefore, partial non-pro-rata distributions will involve not only reevaluation of *all* assets but also attention to the fact that disproportionate partial distribution to non-marital beneficiaries should not be so large as to preclude the surviving spouse's proportional share by way of the final distribution.[122] If such an objective is foreclosed at the termination of the estate, a gift tax will be imposed on the surviving spouse to the extent of the underfunding.[123]

The administrative difficulties occasioned by partial non-pro-rata distributions under the "net appreciation-depreciation" technique

[119] *See* FARR, 301; Stevens, *supra* note 91, at 355; *Revenue Procedure 64-19: Panel Discussion,* 103 TRUSTS & ESTATES 917, 920 (1964).

[120] In response to a question dealing with partial non-pro-rata distributions, an official of the Internal Revenue Service has stated: "The construction adopted by Rev. Proc. 64-19 treats bequests covered by its provisions [denominating the "net appreciation-depreciation" technique] as bequests of fractional shares. Therefore, any intermediate, disproportionate distribution of any significance would require a revaluation of the property and an adjustment of the fraction." Sheets, *supra* note 102, at 72.

[121] For additional examples illustrating the second valuations and calculations attendant partial non-pro-rata distributions, see CASNER 660 (Supp. 1967); Rogovin, *supra* note 118, at 434; *The Internal Revenue Service Position on Marital Deduction Clauses: Revenue Ruling 64-19,* 46 CHI. B. RECORD 5, 9-10 (1964).

[122] *See* Sugarman, *supra* note 83, at 268-69, 274.

[123] *See* note 75 *supra* and accompanying text; Hauser, *supra* note 101, at 33; Sheets, *supra* note 102, at 72; Rogovin, *supra* note 118, at 435.

are intensified by the fiduciary's obligation to satisfy twin valuation requisites.[124] As to the instrument, the federal estate tax values of distributed assets must be equal to the marital bequest. Concurrently, the aggregate date-of-distribution values of the identical assets must be "fairly representative" of net appreciation or net depreciation. To the extent that the Procedure's language of "fairly representative,"[125] presumably perpetuated by the state law, allows some deviation in date-of-distribution values, the administrative burden is eased somewhat.[126] Notwithstanding, one commentator has stated: "Yet the new pecuniary clause imposes concurrent requirements which may tax the ingenuity of the executor."[127] The full impact of this prediction can easily be imagined where an estate has 50 or more assets, many of which create difficult valuation problems such as close corporation stock[128] and many of which may be constantly fluctuating in value.[129] Indeed, the administrative task occasioned by partial non-pro-rata distributions under the "net appreciation-depreciation" method could well be Herculean.

Frequently, the three techniques will impose another administrative burden on the fiduciary, i.e., forced conversion of assets to cash to facilitate compliance with the twin valuation mandates. Such an eventuality unfortunately will result in expenditure of the fiduciary's time, administrative expenses to the estate, a relative financial loss due to the nature of a forced sale, and income taxes to the estate recognized from the sale of appreciated assets.[130] The necessity of this conversion might arise under the "net appreciation-depreciation" approach where pro-rata distributions are impracticable.[131] When all the assets of the estate have appreciated, the exact amount mandate of the "equal to" method might require forced sales to arrive at the instrument's requirements of federal estate tax values

[124] *See* Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317, 325-26 (1964); Edwards 269-70; Polasky 829-30.

[125] Rev. Proc. 64-19, § 2.02, 1964-1 CUM. BULL. 682, 683; text accompanying note 46 *supra.*

[126] *See* Polasky 829 nn.83-84.

[127] *Id.* at 829.

[128] *See* Weinstock, *The Marital Deduction—Problems and Answers Under Revenue Procedure 64-19,* 43 TAXES 340, 346 (1965). For the manner of valuation of unlisted stock and securities, see INT. REV. CODE of 1954, § 2031(b).

[129] *See* note 110 *supra.*

[130] *See* notes 13, 107 *supra* and accompanying text.

[131] *See* Polasky 830.

equaling the marital bequest. This reduction of assets to cash might be avoided under the "no less than" approach where date-of-distribution values may exceed the "floor." Where there has been a depreciation in all of the estate's assets, it is clear that both the "equal to" and the "no less than" techniques require distributions of assets whose aggregate date-of-distribution values equal the "floor."[132] However, it is not clear whether assets must be converted to cash to satisfy the instrument's provisions that federal estate tax values also equal the marital bequest or whether depreciated assets satisfying the "floor" requirement nevertheless may be distributed without the conversion to cash.

Notwithstanding the above hypotheticals, the "normal" estate probably will contain some assets that have appreciated in value and others that have depreciated, with an overall net appreciation in the entire estate. In this circumstance, the relative advantage of the "no less than" technique vis-à-vis the necessity of forced sales is apparent.[133] For example, assume an estate possessing four assets with the following federal estate tax values: *A* asset (50,000 dollars); *B* asset (50,000 dollars); *C* asset (50,000 dollars); and *D* asset (50,000 dollars). Further assume the following date-of-distribution values; *A* asset (65,000 dollars); *B* asset (40,000 dollars); *C* asset (90,000 dollars); and *D* asset (85,000 dollars). Under the instrument's provisions the marital deduction is 100,000 dollars using federal estate tax values. To satisfy the twin valuation requirements when the "net appreciation-depreciation" method is employed, there will have to be a pro-rata distribution of *all* the assets or a conversion to cash of some of them. Under the "equal to" method, some assets will have to be converted to cash. However, under the "no less than" approach, assuming no local law requiring proportional sharing,[134] the fiduciary can distribute assets whose aggregate date-of-distribution values exceed the "floor" but whose aggregate federal estate tax values equal the marital bequest. Specifically, the *A* and *B* assets (aggregate date-of-distribution values of which are 105,000 dollars and therefore only 5,000 dollars above the "floor") could be distributed to the surviving spouse, thereby circumventing the necessity of forced sales.

[132] *See* notes 108-11 *supra* and accompanying text.
[133] *See* Lloyd 900.
[134] *See* note 99 *supra*.

2. Income Taxes to the Estate

Any income taxes possibly recognizable by the estate could be precipitated by two distinct acts: (1) conversion of in-kind assets to cash; and (2) distributions of in-kind assets to beneficiaries. As to the former, there is parity among the three techniques to the extent that under each method the reduction to cash will result in either income tax gain or loss to the estate. The loss or gain will be determined by the disparity between the basis of the asset to the estate[135] and the amount realized upon the sale.[136] The basis to the estate will be either the fair market value at the date of the decedent's death[137] or the alternate valuation date[138] which the fiduciary may elect within certain prescribed conditions.[139] To determine whether the gain or loss will be long term or short term,[140] attention must focus on the six month's holding period.[141]

Regarding potential income taxes to the estate by way of in-kind distribution to beneficiaries, however, the three techniques do not stand in parity. The general principle regarding a pecuniary interest bequest funded with assets valued at date-of-distribution is that when the bequest establishes a "fixed and definite 'dollar amount,'" satisfaction of such fixed monetary claim with appreciated or depreciated assets is equivalent to a "sale or exchange" with the concomitant realization of gains and losses respectively.[142] The gain or loss is calculated by the variance between the basis of the asset to the estate[143] and the dollar obligation discharged (equivalent here to the fair market value of the asset at the date-of-distribution).[144]

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[135] INT. REV. CODE of 1954, § 1014.
[136] *Id.* §§ 1001, 1011.
[137] *Id.* § 2031.
[138] *Id.* § 2032.
[139] *See* CASNER 810-12; R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 85-88 (1966); Treas. Reg. § 20.2032 (1962).
[140] INT. REV. CODE of 1954, § 1222.
[141] *Id.* § 1223.
[142] Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940); Suisman v. Eaton, 15 F. Supp. 113 (D.C. Conn. 1935), *aff'd sub nom.*, Suisman v. Hartford-Connecticut Trust Co., 83 F.2d 1019 (2d Cir.), *cert. denied*, 299 U.S. 573 (1936); Sherman Ewing v. Commissioner, 40 B.T.A. 912 (1939); Rev. Rul. 60-87, 1960-1 CUM. BULL. 286; Rev. Rul. 56-270, 1956-1 CUM. BULL. 325; Treas. Reg. § 1.1014-4(a)(3) (1961); notes 13-18 *supra* and accompanying text.
[143] INT. REV. CODE of 1954, §§ 1014(a), -(b)(1), 2031, 2032; notes 135-39 *supra* and accompanying text.
[144] Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940); Suisman v. Eaton, 15 F. Supp. 113 (D.C. Conn. 1935), *aff'd sub nom.*, Suisman v. Hart-

Absent consideration of the superimposed mandate of the Procedure by way of applicable state law, the defective pecuniary interest language employing federal estate tax values for distribution purposes was not viewed as creating a fixed dollar amount, and it therefore circumvented the attendant gains and losses problem.[145] Now, the relevant inquiry is whether any one of the three techniques alters the bequest in such a manner that it becomes, in effect, a "fixed and definite 'dollar amount.' "

"Equal To"

This appears to be the result under the "equal to" method. Although the fiduciary maintains his discretion to select any assets using federal estate tax values for distribution purposes under the instrument's provisions, he nevertheless is required to choose assets the aggregate date-of-distribution values of which are *equal to* the marital bequest. Therefore, clearly a "fixed and definite 'dollar amount' " must be satisfied, and gains and losses to the estate will be recognized by distributions to beneficiaries.[146] However, the problem

ford-Connecticut Trust Co., 83 F.2d 1019 (2d Cir.), *cert. denied,* 299 U.S. 573 (1936); note 142 *supra.*

[145] *See* FARR 294-95; Cox, *Types of Marital Deduction Formula Clauses,* N.Y.U. 15TH INST. ON FED. TAX. 909, 930-32 (1957); Geller, *Revenue Procedure 64-19: "Variable Pecuniary Bequests,"* N.Y.U. 23RD INST. ON FED. TAX. 1157, 1161 & n.23, 1164 (1965); Polasky 816-17, 865-67.

[146] *See* Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problem,* 104 TRUSTS & ESTATES 69, 70 (1965); Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 724 (1966).

A recently enacted statute in New York poses an interesting question regarding income tax liability to the estate when assets are distributed to beneficiaries. N.Y. PERS. PROP. LAW § 17-f. According to the statute, the fiduciary must distribute assets the aggregate date-of-distribution of which is "no less than . . ." the marital bequest. *Id.* § 17-f(2)(b). However, a limiting instruction to the fiduciary is added: "and to the extent *practicable* to no more than . . ." the marital bequest. *Id.* (emphasis added). This language appears to allow the fiduciary to deviate from the "equal to" amount within the confines of the terminology "practicable." However, will this apparent statutory tolerance for varying aggregate date-of-distribution values between the "equal to" amount and an unknown amount dictated by the word "practicable" make the bequest not one for a "fixed and definite 'dollar amount,' " thereby hopefully avoiding gains and losses to the estate via distributed assets? The answer is by no means clear, and to date two commentators have come to opposite conclusions. In support of the theory that income tax liability is circumvented, one commentator has stated: "It is submitted that the statute allows the fiduciary broad powers of distribution as to the maximum value of assets used to satisfy the marital share . . . . He could distribute assets that have increased substantially in value without contravening the statute. Therefore, the eventual bequest is not ascertainable

is mostly one of bookkeeping, and not income tax liability. Specifically, since the aggregate assets must have both federal estate tax values and date-of-distribution values equal to the marital bequest, the gains and losses are merely balanced off against each other.[147] However, there are three situations where this equality might not be attained. First, the balancing process will be foreclosed in the majority of instances when a trust is involved. Specifically, deductions for losses are not allowed on transfers between the fiduciary of either an inter vivos trust or a testamentary trust and the trust's beneficiaries, and transfers between two trusts which have a common grantor.[148] Secondly, ideal balancing will be unavailable where the gains and losses vary between ones that are long term and ones that are short term.[149] Thirdly, where *all* the estate's assets have depreciated and no conversion to cash is required, the aggregate basis of the distributed assets will exceed the aggregate date-of-distribution values. However, in this instance, the estate will have a capital loss.[150] Therefore, except when a trust is involved, the income tax liability under the "equal to" technique appears to be of slight, if any, consequence.

"Net Appreciation-Depreciation"

Distributions of in-kind assets under the "net appreciation-depreciation" method should not result in recognition of gains and

until distribution which means that the bequest is not in satisfaction of a fixed dollar amount. In conclusion, the answer to the question must be that no capital gain is incurred by the estate." Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law § 17-f*, 30 ALBANY L. REV. 262, 271 (1966). In rebuttal, the second author has declared: "I disagree with the commentator's interpretation of the word 'practicable' and believe the fiduciary must minimize the 'value' of the legacy insofar as he is able to do so, with the result that capital gain should be realized. These differences of views indicate the unfortunate ambiguity in the statute." R. COVEY, *supra* note 139, at 19 (Supp. 1967).

[147] INT. REV. CODE of 1954, § 1222.

[148] *Id.* § 267; CASNER 98-101 (Supp. 1967); Edwards 261 n.21; Estate of Ruth Hanna, 37 T.C. 63 (1961), *rev'd sub nom.*, Estate of Ruth Hanna v. Commissioner, 320 F.2d 54 (6th Cir. 1963). Moreover, the effect of non-deductible losses where a trust is involved is greatly lessened when the combined taxes of the trust and the beneficiaries are considered. When the re-recipient disposes of the asset, gain is recognized only to the extent that such gain exceeds the previously non-deductible loss. INT. REV. CODE of 1954, § 267(d).

[149] *Id.* § 1222.

[150] If a trust is involved, the loss usually will be non-deductible. *Id.* § 267. *See* note 148 *supra* and accompanying text.

losses to the estate.[151] The nature of the defective pecuniary interest bequest should not be changed by the relevant state law in a manner that creates a bequest of a fixed monetary sum. Because the value of the estate will fluctuate under economic pressures, the technique's requirement that assets be "fairly representative of appreciation or depreciation" precludes calculation of a "fixed and definite 'dollar amount'" until distribution date. However, and ironically, this development has precipitated the question of whether this capability of ascertaining the dollar value of the surviving spouse's claim at distribution date results in distributions being made in satisfaction of a fixed and definite monetary sum, with attendant income tax liability. In this regard, one particular case should not be overlooked.

In *Commissioner v. Brinckerhoff*,[152] the testatrix instructed the fiduciary to convert certain in-kind assets to cash and to distribute the resulting proceeds to four named beneficiaries. Instead, the fiduciary distributed the in-kind assets to the beneficiaries, who thereupon released the fiduciary from any claim of breach of the instrument's directive. The court noted, among other things, that the satisfaction of the beneficiaries' claims for cash payments with in-kind assets was "a taxable transaction in which gain or loss of the estate is to be recognized to the extent of the difference between the estate's basis and the value of the cash liability satisfied."[153] The court reasoned that the in-kind distribution satisfied the beneficiaries' definite claim, acknowledging the fact that the exact dollar value of the claim would have been ascertainable only after the fiduciary made

[151] Covey, *supra* note 146, at 70; Stevens, *How to Draft Marital Deduction Formula Clauses Under New Rev. Proc. 64-19*, 20 J. TAX. 352, 354 (1964); *The Internal Revenue Service Position on Marital Deduction Clauses: Revenue Ruling 64-19*, 46 CHI. B. RECORD 5, 19 (1964). In response to a question concerning the income tax liability under the "net appreciation-depreciation" technique, an official of the IRS stated: "[T]he dispositive marital deduction clause of the decedent's will is treated as if it were a fractional bequest. In a fractional bequest, unlike a pecuniary bequest, there is no debt, therefore no gain or loss." Rogovin, *supra* note 118, at 434. *Accord*, Gradwohl, *Marital Deduction "Viewed as at the Date of the Decedent's Death,"* 45 NEB. L. REV. 457, 461 (1966); Smith, *New Marital Deduction Rule and Post October 1, 1964 Wills*, 37 WIS. B. BULL., Oct. issue, 7, 12 (1964). *But see* Colson, *The Marital Deduction and Revenue Procedure 64-19*, 10 PRAC. LAW 69, 76 (Oct. 1964).

[152] 168 F.2d 436 (2d Cir. 1948), *aff'g* 8 T.C. 1045 (1947). *See also* Wilson v. Tomlinson, 306 F.2d 103 (5th Cir. 1962); Lindsay C. Howard, 23 T.C. 962 (1955).

[153] 168 F.2d at 440.

the conversion to cash.[154] In reaching its decision, the court made the disturbing statement: "The fact that the ultimate value realized by the taxpayers in the present case depends upon the fluctuating value of the property devised to the executors does not affect our conclusion . . . ."[155] The adjudication might be susceptible of a broad interpretation: whenever the definite dollar amount of a beneficiary's claim can be ascertained at distribution date, satisfaction of such claim with appreciated property will cause recognition of income tax gain to the estate.[156] However, it is hoped that the case will be limited to its specific facts.

"No Less Than"

The "no less than" method should not alter the pecuniary interest bequest in a manner by which gains and losses are recognized on in-kind distributions to beneficiaries.[157] By merely specifying the minimum or "floor" amount of aggregate date-of-distribution values, this technique does not establish the surviving spouse's claim as a "fixed and definite 'dollar amount.' " Therefore, absent a local law demanding proportional sharing, the fiduciary will have the discretion to vary the aggregate distribution-date values ultimately

[154] A tax liability however arose against the executors when the stock was transferred to the taxpayers in exchange for a release of their claims as legatee-beneficiaries to the cash proceeds which the executors would have realized had they instead exercised the mandatory power of sale given them under the will. . . .

It is argued that the . . . [*Kenan* and *Suisman*] decisions . . . do not apply because they involved only cash legacies of fixed amounts and the executor in such cases had control of the general estate which fluctuated in value in his hands while the legatee was unaffected in the amount of his recovery by the fluctuations. But the facts here involve no legal distinction since the taxpayers had no interest in the real estate during the period of its increase in value but only in such cash as they might receive from the exercise of the executors' power of sale. . . . The present case is therefore to be distinguished not from other legacies which are of a fixed amount in cash but from gifts under a will of property which belongs as such to the legatee.

Id.

[155] *Id.*

[156] *See* Edwards 269; Polasky 809, 868-70.

[157] *See* Covey, *supra* note 146, at 70; Edwards 262; Gradwohl, *supra* note 151, at 461; Polasky 827-28, 867-68. *But see* Lloyd 898, 900; Sugarman, *"Pecuniary Formula" Marital Deduction Bequests: Application of Revenue Procedure 64-19*, 16 W. RES. L. REV. 257, 275 (1965); Wright, *The Marital Deduction Since Revenue Procedure 64-19*, 106 TRUSTS & ESTATES 101, 105 (1967).

received by the surviving spouse above the "floor" amount,[158] so long as he satisfies the instrument's directive that federal estate tax values of the distributed assets equal the marital bequest. Furthermore, without the benefit of a proportional sharing local law, the rationale of *Brinckerhoff*[159] should have no effect on the "no less than" approach where a fixed monetary sum does not exist.[160]

Revenue Procedure 64-19 assumes a neutral position in regard to the effect its mandates might have on the estate's income tax liability when in-kind assets are distributed, stating: "This Revenue Procedure does not relate to any issue arising under the income tax provisions of the Internal Revenue Code."[161] Although some might gather comfort from this declaration,[162] others believe it signals a close scrutiny in the future of the practice whereby income tax gains to the estate are avoided by using federal estate tax values for distribution purposes.[163] If the warning is accurate, the future income tax liability of the three techniques is uncertain. However, until then, the gains problem appears least troublesome under the "no less than" and "net appreciation-depreciation" methods, with the latter possessing greater vulnerability due to the *Brinckerhoff* decision.

3. *Income Tax Consequences to Surviving Spouse*

Distributions pursuant to any one of the three techniques should not result in gain or loss to the surviving spouse. Although a

[158] It has been contended that a certain amount of gain might be recognized on the theory that the mandatory "floor" coupled with the fiduciary's discretion to exceed this minimum results in a transfer which is "in part a sale and in part a gift" within the purview of Treas. Reg. § 1.1001-1(e)(1) (1961). CASNER 664-65 (Supp. 1967). Moreover, it is suggested that the loss should be allowed when the distribution date value is less than the basis. *See* R. COVEY, *supra* note 139, at 22 n.76a (Supp. 1967). *But see* Gradwohl, *supra* note 151, at 461 n.3; Polasky 867. A pecuniary bequest, designed to avoid all problems of gain, has been suggested whereby assets are valued for distribution purposes at the *lower* of federal estate tax values or date-of-distribution values. *See* Covey, *supra* note 124, at 324; Dane, *Marital Deduction Questions: Three Current Tax Issues and Suggested Solutions,* 103 TRUSTS & ESTATES 112, 114 (1964).

[159] For a discussion of the *Brinckerhoff* case, see text accompanying notes 152-6 *supra.*

[160] *See* Polasky 870.

[161] Rev. Proc. 64-19, § 4.02, 1964-1 CUM. BULL. 682, 684.

[162] One official of the IRS has stated: "The Service is not considering any modification or additions to the Revenue Procedure to cover income tax consequences." Rogovin, *supra* note 118, at 434.

[163] *See* Covey, *supra* note 124, at 326; *The Internal Revenue Service Position on Marital Deduction Clauses: Revenue Ruling 64-19,* 46 CHI. B. RECORD 5, 12 (1964).

"fixed and definite 'dollar amount'" is created by the "equal to" method, satisfaction of this claim will result in a funded marital share exactly equalling that sum to which the surviving spouse was entitled.[164] As noted previously, the "no less than" and "net appreciation-depreciation" techniques probably will not be construed as establishing a fixed monetary sum. Therefore, distributions will not be in the form of a "sale or exchange," as the surviving spouse is merely receiving an amount determined by the fiduciary in accordance with the instrument's provisions[165] The "net appreciation-depreciation" approach does not give the surviving spouse a claim to particular assets.[166] Consequently, receipt of any assets cannot be considered as the concurrent relinquishment by the surviving spouse of a claim to other assets; thus, there is no theory of taxable "exchange" upon which to assess gains and losses.[167] Furthermore, even assuming the rationale of *Brinckerhoff* should be found applicable to the "net appreciation-depreciation" method,[168] the resulting "fixed and definite 'dollar amount'" at distribution date would not result in gain or loss being charged to the marital share. In this situation, as with the "equal to" approach, funding the claim will cause the surviving spouse to receive exactly that to which he (she) was entitled.

Nonetheless, any distributions under the three techniques must be viewed in light of §§ 661-62 of the Internal Revenue Code of 1954. These sections declare that a distribution, to the extent that it represents "distributable net income" to the estate,[169] will qualify as a deduction to the estate and *must* be included in the gross income of the beneficiary.[170] An exclusion is provided for "any amount which,

[164] *See generally* Polasky 860-61.

[165] *See* Edwards 268; Polasky 865-68.

[166] *See* notes 83-84, 93-94 *supra* and accompanying text.

[167] Some authorities have advanced the theory that when a beneficiary has a claim to particular assets and consents to receipt of other assets in satisfaction of such claim, the result might be viewed as a taxable exchange to the consenting beneficiary. *See* CASNER 804-05, 807; Peeler, *Unsuspected Realization of Profit in Estates and Trusts,* 98 TRUSTS & ESTATES 1191, 1193 (1959). *But see* Butala, *Administrative Problems Involving Marital Deduction Gifts,* 16 W. RES. L. REV. 290, 296-97 (1965).

[168] For a discussion of the *Brinckerhoff* case, see text accompanying notes 152-6 *supra.*

[169] For the definition of "distributable net income," see INT. REV. CODE of 1954, § 643(a).

[170] *See generally* CASNER 77-92; R. COVEY, *supra* note 139, at 33-37; FARR 249-55; INT. REV. CODE of 1954, § 102; Rev. Rul. 64-314, 1964-2 CUM. BULL. 167; Rev. Rul. 60-87, 1960-1 CUM. BULL. 286.

under the terms of the governing instrument, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property and which is paid or credited all at once or in not more than 3 installments."[171] Although fulfilling the requisite of "in not more than 3 installments" normally will not pose a problem,[172] the three techniques will not qualify under the exclusion as "a gift or bequest of a specific sum of money or of specific property." To so qualify, the specific monetary sum or property "must be ascertainable under the terms of a testator's will as of the date of his death, or under the terms of an intervivous [*sic*] trust instrument as of the date of the inception of the trust."[173]

The Service has stated that under a *formula* pecuniary interest bequest, the amount is not ascertainable at the required time because the final calculations of the adjusted gross estate can be made only after determination of funeral expenses, debts, and administrative expenses, the fiduciary's possible selection of the alternate valuation date, and his decision to treat particular deductions as either estate tax or income deductions.[174] As to *non-formula* pecuniary interest bequests, the ascertainment of the specific sum at the requisite time is impossible under the "no less than" and "net appreciation-depreciation" methods, where federal estate tax values are used to comply with the instrument's provisions and the techniques themselves impose no fixed dollar amount at the testator's death or the inception of the inter vivos trust.[175] However, it is arguable that a *non-formula* pecuniary interest bequest using federal estate tax values for distribution purposes, when coupled with the "equal to" technique, does qualify under the exclusion. Although the specific sum is not ascertainable under the terms of the instrument, the super-

[171] INT. REV. CODE of 1954, § 663(a)(1).

[172] If the will does not specify time of payment, the bequest is construed by the Regulations to be payable in one installment. Treas. Reg. §§ 1.663(a)-1(a), 1.663(a)-1(c) (1961); *see* CASNER 84-85.

[173] Treas. Reg. § 1.663(a)-1(b)(1) (1961). Consequently, although satisfaction of a bequest which creates a "fixed and definite 'dollar amount'" will result in recognized gain to the estate when appreciated assets are distributed, the distribution nevertheless will cause "distributable net income" to be included in the beneficiary's gross income. *Id.* The Service has explicitly declared that "a specific sum of money" qualifying under the exclusion provision is different from a "fixed and definite 'dollar amount'" creating income tax liability to the estate. Rev. Rul. 60-87, 1960-1 CUM. BULL. 286; *see* Stevens, *supra* note 70, at 950.

[174] Treas. Reg. § 1.663(a)-1(b)(1) (1961); Rev. Rul. 60-87, 1960-1 CUM. BULL. 286; CASNER 86-87.

[175] *See* text accompanying notes 151-60 *supra*.

imposed "equal to" mandate does result in a fixed monetary sum at the specified time.[176] Therefore, it might be contended that an instrument containing a *non-formula* bequest, when viewed in light of relevant state law, does designate a specific sum and that a distribution should not carry with it "distributable net income." Absent this possible exception, distributions under the three techniques will give the estate a deduction and *must* be included in the gross income of the beneficiary, to the extent of the "distributable net income."

A beneficiary's gross income might also be augmented with the interest payment from the estate occasioned by the fiduciary's delay in satisfying the bequest.[177] This distribution will not fall within the exclusion to §§ 661-62, because it does not represent a specific sum that was ascertainable at the testator's death or at the inception of an inter vivos trust.[178] This potential enhancement of a beneficiary's gross income is a pertinent consideration in regard to the surviving spouse who normally has a claim not only to rapid payment but also to a preference in order of payment.[179]

4. *Basis of Asset to Surviving Spouse*

Because every distribution might represent to some extent "distributable net income," the calculation of basis to the distributee under the three techniques should be made with this factor in mind.[180] The Regulations[181] and Revenue Ruling 64-314[182] detail the manner by which the inclusion of "distributable net income" will result in an altered basis of each asset to the distributee. With this aside, the following comments will focus on the determination of basis

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[176] *See* text accompanying note 146 *supra.*

[177] *See* text accompanying notes 97-99 *supra.*

[178] INT. REV. CODE of 1954, § 663(a)(1); *see* CASNER 86-88, 92; R. COVEY, *supra* note 139, at 37; Polasky 861 & n.171.

[179] *See* notes 97-8 *supra* and accompanying text.

[180] *See generally* CASNER 96-98 (Supp. 1967); R. COVEY, *supra* note 3, at 35-36; Edwards 257 & n.14.

[181] Treas. Reg. § 1.661(a)-2(f)(3) (1965).

> The basis of the property in the hands of the beneficiary is its fair market value at the time it was paid, credited, or required to be distributed, to the extent such value is included in the gross income of the beneficiary. To the extent that the value of property distributed in kind is not included in the gross income of the beneficiary, its basis in the hands of the beneficiary is governed by the rules in sections 1014 and 1015 and the regulations thereunder. . . .

Id.

[182] 1964-2 CUM. BULL. 167.

vis-à-vis distributions to the marital share which do not represent "distributable net income," a circumstance sometimes created by either the instrument's directives or state law.

The treatment accorded the pecuniary interest bequest using date-of-distribution values for distribution purposes[183] should determine the issue of basis to the surviving spouse of assets funded under the "equal to" method. The relevant parallelism is the fact that both create a claim for a fixed monetary sum, satisfaction of which is construed as a "sale or exchange."[184] Therefore, in funding the marital share's claim, the surviving spouse should receive assets with a basis equal to their fair market value at date of distribution.[185] Under the "equal to" approach, it should be remembered that the detrimental effect of non-recognition of losses from a "sale or exchange" in the majority of distributions dealing with trusts can be mollified under the rule that gain on the subsequent disposal of an asset by the distributee-beneficiary will be realized only to the extent the gain exceeds the previous loss.[186]

Distributions to the marital share under the "no less than" and "net appreciation-depreciation" techniques should not be viewed as a "sale or exchange" in satisfaction of a fixed dollar amount.[187] Consequently, the basis to the surviving spouse should be the basis of the asset to the estate.[188] This value will be determined by either the fair market value at the date of the decedent's death[189] or the alternate valuation date.[190] Therefore, where the surviving spouse receives an appreciated asset, subsequent disposition will result in greater gain due to the perpetuation of the estate's basis. However, if the asset is not "sold" before the surviving spouse's death, then the asset in the second estate will receive a stepped-up basis[191] equal

[183] *See generally* CASNER 82 (Supp. 1967); Peeler, *supra* note 167; Smith, *supra* note 151, at 12.

[184] *See* Kenan v. Commissioner, 114 F.2d 217 (2d Cir. 1940); Rev. Rul. 56-270, 1956-1 CUM. BULL. 325; Treas. Reg. § 1.1014-4(a)(3) (1961); notes 17, 142-44, 146 *supra* and accompanying text.

[185] *See* INT. REV. CODE of 1954, § 1014; Treas. Reg. § 1.1014-4(a)(3) (1961); Polasky 861, 874-76 & nn.226-27.

[186] INT. REV. CODE of 1954, § 267; note 148 *supra* and accompanying text.

[187] *See* notes 151-52, 157-60 *supra* and accompanying text.

[188] INT. REV. CODE of 1954, § 1014; *see* CASNER, 816; Polasky 868, 875-76 & n.227; Smith, *supra* note 151, at 12.

[189] INT. REV. CODE of 1954, § 2031.

[190] *Id.* § 2032.

[191] *Id.* § 1014.

to the fair market value at the date of the surviving spouse's death[192] or the alternate valuation date,[193] thereby avoiding gain recognized to either the first estate or the surviving spouse. This flexibility is unavailable with the "equal to" method where the surviving spouse must assume as basis the date-of-distribution value of the asset. Likewise, if the rationale of *Brinckerhoff* should be found applicable to the "net appreciation-depreciation" approach,[194] then the basis to the surviving spouse will be the date-of-distribution's fair market value.[195]

5. *Charitable Remainder Deduction*

In estate tax planning, frequently a pertinent inquiry is the deductibility of charitable transfers.[196] Before a gift to charity will be deductible from the decedent's gross estate, the charitable interest must be "presently ascertainable."[197] While this valuation requirement can normally be fulfilled when dealing with specific bequests, charitable remainder interests are often impossible to evaluate.[198] Indeed, this result might be occasioned by a marital deduction distribution plan.

The "equal to" technique should not prevent a charitable remainder interest from being "presently ascertainable."[199] The fiduciary must fund the marital share with an exact amount and does not have the discretionary power to alter the value of the remainder interest by distributions above the "floor." Similarly, the "net appreciation-depreciation" method should not bar ascertainment of the charitable remainder.[200] Although the final dollar amount may fluctuate due to economic conditions, the surviving spouse's interest is fixed and cannot be altered by the fiduciary in a manner that will affect the remainder interest. The Service, however, will prob-

[192] *Id.* § 2031.
[193] *Id.* § 2032.
[194] *See* notes 152-56 *supra* and accompanying text.
[195] Commissioner v. Brinckerhoff, 168 F.2d 436 (2d Cir. 1948), *aff'g* 8 T.C. 1045 (1947); Lindsay C. Howard, 23 T.C. 962 (1955).
[196] INT. REV. CODE of 1954, § 2055.
[197] Treas. Reg. § 20.2055-2(a) (1962).
[198] *See* CASNER 897-920; FARR 268-70; J. LEWIS, THE ESTATE TAX 134-36 (Practising Law Institute, 1964); Treas. Reg. § 20.2055-2(b) (1965).
[199] *See* Cantwell, *Revenue Procedure 64-19: Statutory Relief*, 104 TRUSTS & ESTATES 953, 954 (1965); Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problem*, 104 TRUSTS & ESTATES 69, 70 (1965).
[200] *See* Covey, *supra* note 199, at 70.

ably be successful in disallowing the charitable deduction under the "no less than" technique.[201] Absent a local law requiring proportional sharing, the fiduciary's discretion to distribute assets in excess of the "floor" represents a potential influence on the value of the remainder interest, making it unascertainable and therefore nondeductible.

6. *Post-Mortem Estate Planning*

The degree of post-mortem estate planning possibly desired by the decedent clearly will not be available by way of any one of the three techniques. Indeed, herein lies the practical, if not technical, reason for Revenue Procedure 64-19.[202] Therefore, the germane question is which method circumscribes this post-death flexibility the least. Generally, the response will be the "no less than" approach. Both the "equal to" and "net appreciation-depreciation" techniques require the fiduciary's compliance with an exact amount which is unalterable under the former method and is constantly fluctuating, solely from the external influence of economics, under the latter method. By comparison, so long as federal estate tax values of distributed assets comport with the instrument's directives and a proportional sharing local law does not exist, the fiduciary under the "no less than" approach must satisfy only the mandatory "floor" but *can* choose to exceed this minimum.[203] This latitude allows the fiduciary greater flexibility in influencing estate and income tax consequences to, and the "most attractive" distribution plan for, the testator's estate, the surviving spouse's estate, and all beneficiaries.[204]

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[201] *See* R. COVEY, THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS 51, 58 (1966); Edwards 263.

[202] *See* Sugarman, *supra* note 157, at 260-61.

[203] One frequently reads the statement: "Under the 'no less than' requirements, there is a 'floor' but no 'ceiling.'" *See* Covey, *supra* note 199, at 70; Comment, *Drafting Solutions to Rev. Proc. 64-19*, 9 ST. LOUIS U.L.J. 517, 523 (1965); Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19*, 41 IND. L.J. 711, 721 (1966). However, there is a very real limitation on the "ceiling" of aggregate distribution date value of distributed assets. To comply with the instrument's directives, these assets funding the marital share *must* have an aggregate federal estate tax valuation exactly equal to the marital bequest. The interaction of the twin valuation mandates does result in a "ceiling." *See* notes 106-14 *supra* and accompanying text.

[204] For discussions of various aspects of post-mortem estate planning, see generally Garrett, *Post-Mortem Estate Planning: Taxwise Administration Can Reduce Overall Imposts*, 98 TRUSTS & ESTATES 1194 (1959); Laikin, *Your Estate Plan: Taxes—Life Insurance—Trusts*, 104 TRUSTS & ESTATES 98 (1965); Stevens, *How Post-Mortem Estate Planning Can Reduce Income and Estate Taxes*, 21 J. TAX. 288 (1964).

Even though dissection of every conceivable estate vis-à-vis the three techniques is impossible, a few general comments hopefully will highlight the relative merits of each method, assuming a general appreciation in the estate's assets unless otherwise indicated. Furthermore, it should not be forgotten that in implementing any one of the three approaches, there are various elections available to the fiduciary by which he may influence the distribution plan:[205] (1) selecting certain deductions, such as administrative expenses,[206] as either income[207] or estate[208] tax deductions; (2) deciding whether accrued income on certain non-interest-bearing obligations will be taken on the estate's final income tax return;[209] and (3) choosing the valuation date as either the date of the decedent's death[210] or the alternate valuation date.[211] The ensuing discussion will be made within this general framework.

[205] *See generally* COVEY, *supra* note 201, at 78-92; Browne, *Effect of Elections by an Executor upon the Estate and upon the Beneficiaries,* N.Y.U. 23RD INST. ON FED. TAX. 1239 (1965); Butala, *supra* note 167, at 297-99.

[206] Presently, even though the size of the marital deduction may be altered by claiming administrative expenses as income tax deductions, the Service nevertheless will honor the entire claim for the marital deduction. Rev. Rul. 55-643, 1955-2 CUM. BULL. 386; Rev. Rul. 55-225, 1955-1 CUM. BULL. 460. This position may be subject to attack because of the recent case of Jackson v. United States, 376 U.S. 503 (1964), where the Court concluded that "terminability of an interest for purposes of the marital deduction must be viewed at the instant of the decedent's death." Cohen, *Treasury Views on Current Questions,* 104 TRUSTS & ESTATES 9, 10 (1965). An official of the Service has indicated that any change in its present stance regarding claiming administrative expenses as income tax deductions will be prospective in application. Rogovin, *The Sound and the Fury: Official Views on Revenue Procedure 64-19,* 104 TRUSTS & ESTATES 432, 435 (1965).

[207] INT. REV. CODE of 1954, § 212.

[208] *Id.* § 2053.

[209] *Id.* § 454(a).

[210] *Id.* § 1014.

[211] *Id.* § 2032; see Blattmachr, *Choosing Optional Valuation Date,* 99 TRUSTS & ESTATES 714 (1960); Butala, *supra* note 167, at 298-99; Comment, *Choosing a Marital Deduction Formula Clause,* 44 MARQ. L. REV. 532, 535-36 (1961). One official of the IRS has raised the possibility that the marital deduction will be adversely affected, in whole or in part, when the alternate valuation date may be selected because with this contingency it cannot be said that the surviving spouse's interest vests as required at the time of the decedent's death. Reiling, *Revenue Procedure 64-19: Rethinking Marital Deduction Clauses,* 103 TRUSTS & ESTATES 905-06 (1964). Observing that this conclusion originated from a discussion regarding post-mortem manipulation objectionable under Revenue Procedure 64-19, one commentator has retorted: "To equate the existence of a statutory election provided by the Code with tinkering based on artful draftsmanship is an extraordinary step." Browne, *supra* note 205, at 1247. *Accord,* CASNER 633-36 (Supp. 1967); Polasky 884 n.273; Straus, *Revenue Procedure 64-19: When Should Agreements Be Made?* 103 TRUSTS & ESTATES 911 (1964).

The total tax consequences to the decedent's estate, the surviving spouse's estate, and all beneficiaries can be more effectively determined under the "no less than" method. First, the fiduciary possesses a potential tax savings device with the basis of assets to the distributee equalling the estate's basis.[212] Because date-of-distribution values may exceed the "floor," the proximity of an asset's basis to its fair market value at distribution date can be more freely selected after various questions are answered. How much gain or loss recognized on subsequent disposal of assets should be postponed by a generation? In light of progressive rates, which of the beneficiaries should realize how much potential gain or loss? Who should receive presently appreciated assets which probably will depreciate, and vice versa?[213] What possibility is there that the surviving spouse's death is imminent so as to provide a credit to the second estate for previously taxed property?[214] Which distributable assets is the surviving spouse most likely to retain and thus qualify for a stepped up basis at death?[215] What are the needs of the surviving spouse in relation to the other beneficiaries?

The manipulative vehicle—basis of asset to distributee is the estate's basis—is present under the "net appreciation-depreciation" technique,[216] assuming the rationale of *Brinckerhoff* is found inapplicable. However, because the fiduciary must focus on the "fairly representative" mandate requiring an exact sum at final distribution, he has less opportunity to control which assets will go to the spouse based on the disparity between their basis and fair market value. Under the "equal to" method, favorable postponement of gains and losses is foreclosed, with the asset's basis to the distributee being its fair market value at distribution date. However, as noted previously, this hopefully will be only a bookkeeping task of balancing.[217] If not, the capital gain to the estate normally results from forced sales necessitated by twin valuation requirements. If substantial depreciation occurs, the structure of the estate's assets can be shifted back somewhat to the "norm" by selecting the alternate valuation date and making distributions shortly

[212] *See* notes 187-93 *supra* and accompanying text.
[213] *See* note 95 *supra* and accompanying text.
[214] INT. REV. CODE of 1954, § 2013.
[215] INT. REV. CODE of 1954, § 1014; *see* notes 191-93 *supra* and accompanying text.
[216] *See* notes 187-93 *supra* and accompanying text.
[217] *See* notes 146-50 *supra* and accompanying text.

thereafter.[218] If this election is rejected, the fiduciary merely transfers the potential losses to the beneficiaries under the "no less than" and "net appreciation-depreciation" techniques. With the "equal to" method, the estate realizes the losses, probably losing the tax savings because of lack of offsetting gains.

The income tax liability from forced sales occasioned by the twin valuation mandates is less severe with the "no less than" approach.[219] Forced reductions to cash are precipitated more frequently by the "equal to" and "net appreciation-depreciation" methods where an exact amount *must* be funded the marital share. The quantities of conversions necessitated by the three techniques under varying economic conditions have been explored previously.[220] However, regarding total tax consequences, two factors deserve highlighting. The lack of an exact sum requirement under the "no less than" approach allows the fiduciary to achieve the most favorable interaction between conversions to cash and the basis of assets to the distributee. With attention to progressive rates, the fiduciary can decide if it is better for the estate to realize the gain or loss through "sale" or to allow the income tax consequences to be determined by the subsequent actions of the beneficiaries.[221] Secondly, when there is substantial depreciation, the above-mentioned interaction can be analyzed in light of the alternate valuation date.[222] Again, these two considerations allow a greater range for discretion under the "no less than" method.[223]

The last major tax inquiry concerns the ultimate amount to be funded the surviving spouse, which sum can increase the estate taxes on the second estate. In this regard, the weakness of the "net appreciation-depreciation" technique is readily apparent. Beside the fiduciary electives which may affect the marital share, economic factors alone will dictate the exact amount that is "fairly representative."[224] Because we are living in an age of inflation, this

[218] *See* COVEY, *supra* note 201, at 85-88; Covey, *The Marital Deduction: Revenue Procedure 64-19 and Formula Provisions,* 36 N.Y.S.B.J. 317, 325 (1964).

[219] *See* notes 106-14, 130-35 *supra* and accompanying text.

[220] *See* notes 106-14, 130-35 *supra* and accompanying text.

[221] *See generally* Polasky 874-76.

[222] *See* notes 211, 218 *supra* and accompanying text.

[223] *See* Covey, *supra* note 218, at 324-25; Polasky 885-86.

[224] *See* Weinstock, *The Marital Deduction—Problems and Answers Under Revenue Procedure 64-19,* 43 TAXES 340, 346 (1965); Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 721-22 (1966).

method could easily result in undesirable overfunding of the marital share.[225] The inflexibility created by an exact amount requisite is also present with the "equal to" approach, except that the surviving spouse's share cannot be overfunded when the estate appreciates in value.[226] The absence of forced overfunding when there is general appreciation also is present with the "no less than" approach. Furthermore, when general depreciation occurs, relative overfunding under the latter two techniques[227] might be eliminated by election of the alternate valuation date.[228]

The greater control over total tax consequences available under the "no less than" method becomes increasingly more significant when viewed in connection with the interrelated decision as to which assets should be distributed to particular beneficiaries. Attempted avoidance of forced sales, pro-rata distributions, multivaluations under any technique will inhibit the matching of certain assets with specific beneficiaries. As noted earlier, these restraining forces are most influential with the "net appreciation-depreciation" method, and to a lesser extent with the "equal to" approach.[229] However, the degree of fiduciary discretion under the "no less than" technique provided by the allowance of distributions in excess of the "floor" facilitates greater estate planning after the decedent's death.[230] During this period, the needs of the surving spouse vis-à-vis the children-beneficiaries can be appraised. This inquiry is irrelevant under the other two techniques where a mandatory exact amount exists. Furthermore, the "no less than" flexibility allows increased fiduciary attention to the determination of which assets have the greatest income-producing potential, which are more susceptible to ease in valuation, and which assets such as close corporate stock and real estate should be funded in entirety to particular beneficiaries. It appears clear that the permutations of asset selections are infinitely greater under the "no less than" technique where the fiduciary does not have the yoke of an exact amount requirement.

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[225] *See* Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517, 524-25 (1965).

[226] *See* Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 724 (1966).

[227] *See* Hauser, *Latest Developments in Taxation of Estates and Trusts Raise New Caveats for Tax Men,* 21 J. TAX. 32, 33 (1964).

[228] *See* notes 211, 218 *supra* and accompanying text.

[229] *See* notes 104-35 *supra* and accompanying text.

[230] *See* Polasky 830-32, 883-86.

7. The Decedent's Intent

The last comparative area is the extent to which each of the three techniques furthers the decedent's intentions. The inquiry has been so phrased because it has long been clear that Revenue Procedure 64-19 forbids complete implementation of the decedent's desires. The discussion will focus on six intentions in the order of importance this author believes any decedent might have ranked them.

First, the use of a *formula* bequest evidences a firm desire for the estate to obtain the maximum marital deduction.[231] All three methods fulfill this objective. This is true even under the "equal to" and "no less than" approaches where there has been substantial depreciation and the aggregate date-of-distribution values are less than the "floor."[232]

Second, the decedent gave the fiduciary discretion to make in-kind distributions for the purpose of avoiding forced conversions to cash of *all* assets.[233] There is parity among the three techniques in this regard as each accomplishes this objective.[234] The decedent's desire to limit forced sales to the "necessary" minimum will be discussed subsequently in connection with ease of administering the estate.[235]

Third, the grant to the fiduciary to use federal estate tax values for distribution purposes signals the decedent's aim that income tax gain to the estate not be recognized on distributions.[236] Although often gains and losses from distributions can be balanced off against each other under the "equal to" method, it nevertheless appears that normally net gain from either forced sales or in-kind distributions will be recognized to the estate under this technique. The "net appreciation-depreciation" approach should not frustrate this de-

[231] *See* Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 718-19 (1966).

[232] See authorities cited in note 111 *supra.*

[233] *See Report of Committee on Administration and Distribution of Decedent Estates,* 104 TRUSTS & ESTATES 976, 984 (1965).

[234] If the fiduciary does not have the power to make distributions in kind, then the pecuniary interest bequest is not within the purview of the Procedure's mandates. Rev. Proc. 64-19, § 4.01(3)(b), 1964-1 CUM. BULL. 682, 684; *see* note 41 *supra* and accompanying text.

[235] *See* notes 245-46 *infra* and accompanying text.

[236] *See* Covey, *supra* note 199, at 69-70; Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517, 526 (1965); *Report of Committee on Administration and Distribution of Decedent Estates,* 104 TRUSTS & ESTATES 976, 984 (1965).

cedent's desire unless the rationale of *Brinckerhoff* is invoked.[237] Notwithstanding this adjudication, in-kind distributions under the "no less than" method should not result in gain or loss to the estate.[238] Although one cannot be absolutely certain of future judicial interpretation of these three new hybrid bequests,[239] the "no less than" technique seemingly is the safest choice for guaranteeing the avoidance of gain or loss to the estate from in-kind distributions.

Fourth, the decedent did not want the amount ultimately funded the surviving spouse to be fortuitiously determined by fluctuations in the estate due solely to economic factors.[240] One might contend that if the decedent had thought about it, he would have wanted the surviving spouse to participate in the estate's appreciation or depreciation. The obvious retort, which has been mentioned by others, is that the decedent did consider this alternative, rejected it, and instead selected the pecuniary bequest.[241] Therefore, it is possible that the "net appreciation-depreciation" technique subverts the decedent's desire to avoid proportional sharing.

Fifth, the decedent desired to grant the fiduciary maximum discretion in determining the dollar amount ultimately funded the surviving spouse so long as the maximum marital deduction was obtained. This statement is uncontrovertible as the defective pecuniary interest bequest language designates federal estate tax values for distribution purposes. The important issue is what are the reasonable inferences from this grant regarding the extent to which the decedent wished the fiduciary to use the discretionary power. Some might contend that the decedent's prime objective was to give the surviving spouse an exact amount as evidenced by the selection of a pecuniary bequest.[242] This argument would deemphasize the testator's selection of federal estate tax values for distribution purposes,

[237] For discussion of the *Brinckerhoff* case, see notes 152-54 *supra* and accompanying text.

[238] *See* notes 157-60 *supra* and accompanying text.

[239] *See* notes 161-64 *supra.*

[240] *See* COVEY, *supra* note 201, at 44; Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law* § *17-f,* 30 ALBANY L. REV. 262, 270 (1966).

[241] *See* Cantwell, *supra* note 199, at 954.

[242] *See* Cantwell, *supra* note 199, at 954; Lindsay, *Marital Deduction Will Clauses,* 39 FLA. B.J. 1068, 1072 (1965); Comment, *Marital Deduction Pecuniary Formula Bequests: Revenue Procedure 64-19 and N.Y. Personal Property Law* § *17-f,* 30 ALBANY L. REV. 262, 270 (1966).

on the ground that this choice was made merely to avoid income tax gain to the estate on in-kind distributions. Although this reasoning is plausible, a more realistic inference would appear to be that the decedent did desire the fiduciary to use his discretion to determine the amount of the marital share, taking into consideration developments occurring after the decedent's death. It is highly arguable, if not indeed inescapable, that the decedent envisioned the ideal amount funded the marital share as a sum ascertained by the fiduciary after appraising the relative needs of the beneficiaries, estate and income tax advantages of various distribution plans, and general estate planning considerations.[243] Indeed, the *raison d'être* of this strategy—funding the surviving spouse the least amount of assets necessary to obtain the maximum marital deduction—is what provoked the Procedure itself. Although this underfunding is no longer available, some post-mortem manipulation is possible under the "no less than" technique. For this reason, this method sustains as much as possible the decedent's directive of fiduciary discretion, regardless of the inarticulated motivations.

Sixth, the use of federal estate tax values for distribution purposes and the provision for in-kind distributions clearly demonstrates the decedent's desire to realize two objectives: (1) distributions made in terms of income and estate tax consequences to the decedent's estate, the surviving spouse's estate, and all beneficiaries; and (2) the interrelated factor of implementing the estate with relative administrative ease. In light of previous discussion, it seems clear that the "no less than" technique comes closest to accomplishing this testamentary intent, in terms of forced sales, the manipulative tool of basis to the distributee, combined taxes on the first and second estates, income tax gains to the decedent's estate from in-kind distributions, and pro-rata distributions.[244] Regarding total tax consequences, the "no less than" method has the unfortunate feature of denying the estate a deduction for the charitable remainder interest.[245] However, potential loss of this tax savings should not be determinative. Some

[243] *See* Comment, *Drafting Solutions to Rev. Proc. 64-19,* 9 ST. LOUIS U.L.J. 517, 526 (1965); Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 718-19 (1966).

[244] *See* Polasky 830-32, 871-85; notes 212-33 *supra* and accompanying text.

[245] *See* note 201 *supra* and accompanying text.

estates will not involve gifts to charities. Furthermore, in the majority of cases where there is a charitable interest, it will be in the form of a specific bequest which usually will be deductible. Therefore, when emphasis is properly placed on the infrequency of the charitable remainder and the total tax savings available to all bequests subject to the "no less than" technique, the fear of nondeductibility loses much of its influence.

A Choice

The appraisal of the three techniques vis-à-vis the decedent's intent clearly exposes, if it was not therefore apparent, this author's choice of the "no less than" method.[246] However, the Achilles' heel of this selection should not be overlooked. The "no less than" technique will produce very unfavorable results if adopted by a state which also maintains a local law requiring proportional sharing.[247] The net result is that when there has been substantial depreciation in the estate's value, the mandatory "floor" will prevent the surviving spouse's participation in the depreciation aside from the employment of the alternate valuation date, thereby effectuating relative overfunding of the second estate. Further, the surviving spouse *must* share in appreciation, a result left to the fiduciary's discretion under an untainted "no less than" statute. Consequently, this technique, when coupled with a local law demanding proportional sharing, offers no additional advantages and eliminates the most attractive feature of the "net appreciation-depreciation" method. In sum, if a state is to adopt a "no less than" statute, it should detail the extent to which the fiduciary's discretion inherent in the "no less than" technique will or will not be limited by the rule of impartiality.[248] This specificity will have the added advantage of discouraging internecine family disputes.[249]

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[246] *Accord,* Lloyd, *Revenue Procedure 64-19: Background of Drafting Problems,* 103 TRUSTS & ESTATES 898, 900 (1964); Polasky 885-86. *But see* Cantwell, *Revenue Procedure 64-19: Statutory Relief,* 104 TRUSTS & ESTATES 953, 954 (1965); Note, *The Estate Tax Marital Deduction—Revenue Procedure 64-19,* 41 IND. L.J. 711, 723-24 (1966), where the "equal to" method is advanced.

[247] *See* note 99 *supra.*

[248] *See* Covey, *Statutory Panacea for 64-19?: Existing and Proposed Remedies for Marital Deduction Problems,* 104 TRUSTS & ESTATES 69, 70 (1965).

[249] *See* notes 24, 100 *supra* and accompanying text.

APPENDIX

SUGGESTED MODEL STATUTE

Section 1. As used in the following sections of this act, the terms "pecuniary bequest" and "transfer in trust of a pecuniary amount" mean, respectively, a bequest in a last will and testament or a transfer under a trust instrument of a specific amount of money, which amount is either expressly stated in the instrument or determinable by means of a formula which is stated in the instrument. Whether a bequest or transfer in trust is pecuniary in character depends upon the intention of the testator or grantor.

Section 2. Whenever under a last will and testament or trust instrument the executor, trustee or other fiduciary is allowed to, empowered to, authorized to or required by the terms of such instrument to satisfy wholly or partly a pecuniary bequest (including a pecuniary bequest in trust) or transfer in trust of a pecuniary amount, to or for the benefit of a surviving spouse of a decedent, by distributing or allocating wholly or partly assets of the estate or trust in kind at the values as finally determined for Federal estate tax purposes, then the executor, trustee, or other fiduciary shall satisfy such pecuniary bequest or transfer in trust of a pecuniary amount by the distribution or allocation of assets, including cash, having an aggregate fair market value at the date, or dates, of distribution or allocation amounting to no less than the amount of the pecuniary bequest or transfer in trust of a pecuniary amount as finally determined for Federal estate tax purposes, unless the last will and testament or trust instrument provides otherwise.

Section 3. A provision in a last will and testament or trust instrument that an executor, trustee or other fiduciary so allowed, empowered, authorized or required by its terms to satisfy wholly or partly such pecuniary bequest or transfer in trust of a pecuniary amount with assets of the estate or trust in kind at the values as finally determined for Federal estate tax purposes shall act fairly or equitably or fairly equitably or not arbitrarily or not unreasonably [or words of similar import] in satisfying such bequest or transfer, shall be deemed, in the absence of clear provisions to the contrary, to be a direction to distribute or allocate assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution or allocation in

satisfaction of such pecuniary bequest or transfer in trust of a pecuniary amount.

Section 4. Whenever there is a provision in a last will and testament or trust instrument that an executor, trustee or other fiduciary so allowed, empowered, authorized or required by its terms to satisfy wholly or partly such pecuniary bequest or transfer in trust of a pecuniary amount with assets of the estate or trust in kind at the values as finally determined for Federal estate tax purposes must or may, in satisfying such bequest or transfer, either:

(a) distribute or allocate assets, including cash, having an aggregate fair market value at the date, or dates, of distribution or allocation amounting to no less than the amount of the pecuniary bequest or transfer in trust of a pecuniary amount as finally determined for Federal estate tax purposes, or

(b) distribute or allocate assets, including cash, fairly representative of appreciation or depreciation in the value of all property thus available for distribution or allocation in satisfaction of such pecuniary bequest or transfer in trust of a pecuniary amount, then, the executor, trustee or other fiduciary nevertheless shall be required to follow the first alternative and shall be required to distribute or allocate assets, including cash, having an aggregate fair market value at the date, or dates, of distribution or allocation amounting to no less than the amount of the pecuniary bequest or transfer in trust of a pecuniary amount as finally determined for Federal estate tax purposes.

[Section 5. If, in an instrument which provides for a pecuniary bequest or transfer in trust of a pecuniary amount, the executor, trustee or other fiduciary is allowed to, empowered to, authorized to or required to satisfy wholly or partly such bequest or transfer by a distribution or allocation in kind, and the instrument is silent as to the value to be given to assets distributed or allocated in kind, the executor, trustee or other fiduciary shall satisfy such pecuniary bequest or transfer in trust of a pecuniary amount with assets valued at their respective fair market values on the date, or dates, of their distribution or allocation.]

Section 6. This act shall not be deemed to create any implication of change in existing law, to invalidate any distribution in kind actually made prior to the effective date of this act with respect to which values other than herein specified were used, or to impose any

obligation or liability upon the executor, trustee or other fiduciary by reason of any distribution in kind actually made prior to the effective date of this act with respect to which values other than herein specified were used.

Section 7. The provisions of this act are severable. If under any circumstances any provision, part, sentence, paragraph, or section of this act is declared invalid, unconstitutional or void, such declaration shall not affect the part that remains nor impair its validity when applied to other circumstances.

Section 8. This act shall be effective with respect to all last wills and testaments and revocable intervivos trust instruments executed or created before or after the effective date of this act by persons who die [on or] after the effective date of this act, and to irrevocable intervivos trust instruments executed or created [on or] after the effective date of this act.

Section 9. It has been found and hereby is declared by the Legislative [or General] Assembly of the State of———— that many residents of this State have executed last wills and testaments and trust instruments in good faith believing such instruments to qualify for the marital deduction for Federal estate tax purposes, but which may not so qualify or may be deemed not to so qualify (particularly by virtue of Revenue Procedure 64-19 issued by the Internal Revenue Service as effective on October 1, 1964), at great financial hazard and loss to their surviving spouses and estates, and causing possible confusion and expense in the administration of estates and that the enactment of this act hopefully will result in curing such disqualifications in many cases. Therefore, an emergency hereby is deemed to exist, and this act, being necessary for the immediate preservation of the public peace, welfare and safety, shall take effect and be in force from and after its passage [and approval, or upon its otherwise becoming a law].

COMMENTS: The above suggested statute, which follows primarily the relevant statute of the State of Arkansas (ARK. STAT. ANN. 62-2909.1-.5 (Supp. 1967), contains a section and scattered language in brackets which is entirely optional within the framework of this model. However, there are other sections which should be seriously considered by legislative drafters for addition to the above statute. (1) A section might be drafted wherein if the objectionable pecuniary bequest or transfer in trust of a pecuniary amount contains

a charitable remainder, the "net appreciation-depreciation" technique would be superimposed as opposed to the "no less than" technique, thereby allowing for the deductibility of the charitable remainder. Such a decision might be justifiably made by a legislative body which feels that charitable remainders appear in the instruments of its residents an appreciable number of times. If this type of section is included, it might provide that its provisions will be invoked only if the amount of the charitable remainder constitutes a certain specified percentage of the estate's assets or is in a certain specified ratio to the amount of the potential marital deduction. (2) A section might be added which, if the "no less than" technique were employed, would specifically detail the limits within which the fiduciary may exercise his discretion to distribute assets in excess of the "floor." (3) Lastly, to avoid the possibility where a state's law was intended to be, but was not, "clear" in terms of the Procedure and where an objectionable pre-October 1, 1964, instrument was involved, a section could be drafted for the purpose of clearly establishing the requisite authority of the fiduciary to enter into the agreements necessary for saving the marital deduction in such a case. Five states have enacted such statutes: N.C. GEN. STAT. § 28-158.2 (1966); S.C. CODE ANN. § 19-569 (Supp. 1967); TENN. CODE ANN. § 30-1317 (Supp. 1967); VA. CODE ANN. § 64-71.2(c) (Supp. 1966); W. VA. CODE § 44-5-12(c) (Supp. 1967).